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The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It

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THE CONTRADICTION BETWEEN EQUAL PROTECTION'S MEANING AND ITS LEGAL SUBSTANCE: HOW DELIBERATE INDIFFERENCE CAN CURE IT

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ABSTRACT

This Article highlights the inherent ambiguities of racial antidiscrimination's core legal language: "equal protection under the law" and "discrimination based on race." It then analyzes how and why the Court has never answered fundamental questions regarding the meaning of these terms. Thus, this Article answers these fundamental questions itself by exploring the original intent behind the Equal Protection Clause. Against this backdrop, this Article reveals how the Court's standard for assessing discrimination claims, the intent doctrine, assumes a meaning for equal protection that is inconsistent with its original meaning. Rather than reflecting equal protection's meaning, the standard lacks any basis and is but a reflection of the Court's values. In addition, the intent standard has proven unreliable in application and has provided lower courts with inadequate guidance. This inconsistency and unreliability is increasingly surfacing in recent years as the Court's simplistic iterations of discrimination are insufficient to resolve complex situations. To create a consistency with equal protection's meaning and resolve application problems, this Article proposes a new standard of deliberate indifference. Deliberate indifference requires the government to consider the racial harms that it perpetrates and avoid them when possible or when no legitimate reason justifies them. In this respect, it ensures that the government affords its citizens the equal consideration, value, and protection to which the Fourteenth Amendment entitles them.

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INTRODUCTION

From *Plessy v. Ferguson*[1] to *Grutter v. Bollinger*,[2] no question has been more central to racial and social justice, or more complex, than what it means to deny someone equal protection under the law. Though offering a conciseness that intimates simplicity, neither the courts nor the public have reached a full understanding of this phrase's import in regard to race. Rather, the meaning has been approximated, changed and, as of late, assumed or ignored. The predominant meaning at any single time has often been more a reflection of the cultural context than of an inherent legal principle. For a time, leaving the issue unsettled may not have created insurmountable problems in adjudication. However, after the Supreme Court in *Alexander v. Sandoval*[3] eliminated a cause of action for everything but the most narrowly construed notions of intentional racial discrimination, the lingering issue of equal protection's meaning resurfaced and now demands further explanation because *Sandoval* seemingly eliminates the ability to challenge state perpetuated racial inequity that is otherwise unjust.[4] Without

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[1] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[2] 539 U.S. 306 (2003).

[3] 532 U.S. 275 (2001).

[4] *Id.* at 293. The Court in *Jackson v. Birmingham*, 544 U.S. 167 (2005), demonstrated the problem with *Sandoval*'s narrow interpretation, as it was forced to treat intentional discrimination broadly so as to allow a cause of action for retaliation.

further explanation, law as a measure to remedy and redress racial disadvantage may fade into the recesses.

Many civil rights advocates already feel the reality of the law's powerlessness creeping in on a daily basis.[5] As a previous educational civil rights attorney, I can divide my existence into pre- and post-*Sandoval* worlds. After *Sandoval*, I still consistently got phone calls from minorities who were sure their children had suffered discrimination and felt that the law must prohibit the obscene indignity or significant loss of educational opportunity that was visited upon them. Unfortunately, even when I strongly suspected discrimination, it would become painfully clear that the circumstances would not allow us to make out a claim of discrimination. The wound that I refused to inflict, however, was telling them that had they called before *Sandoval* they might very well have had a case.

One of the most vivid examples is an African-American community whose schools' data ultimately revealed that in elementary school, for instance, white and black students who came from similar backgrounds could come through the schoolhouse doors in equal numbers and sit next to each other in class, but the education they obtained was very different.[6] Nearly every single white student who came through the doors achieved at or above grade level but only about two out of three black students achieved at grade level. Some of this achievement difference could be explained by the fact that whites were in class more because the rates of discipline were racially disproportionate. However, no matter the numbers or how many parents told me of the extreme, irrational, or summary discipline that was visited on their children, we could not put together a viable claim of discrimination under the current legal standards. In the end, we had a school district that knew its policies and employees were creating severe racial inequity and that was completely uninterested in pursuing available alternatives. Unfortunately, the evidence simply could not establish whether racial motivations, simple incompetence, or callousness caused the racial inequities. Ultimately, *Sandoval*'s narrow requirements barred an equal protection or discrimination claim, and scores of African-American students continued to sit in chairs next to similarly situated white students who learned the necessary skills to pass exams, move to the next grade, graduate from high school, and attend college, while the African-American students were left behind.[7]

The only way for the law to address the problems of these children and those in countless other communities is to seriously approach the question of what it means to deny someone equal protection. The difficulty in doing so stems from the inherent

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[5] *See generally* Sam Spital, *Restoring* Brown*'s Promise of Equality After* Alexander v. Sandoval*: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93 (2003) (discussing how *Sandoval* erased the promise of the Civil Rights Act).

[6] To prevent prejudicing any future claims on behalf of this community, I have refrained from identifying it or citing to the sources where data regarding it can be found.

[7] *See, e.g.*, Spital, *supra* note 5, at 93–111 (discussing the bleak legal picture for minority students after *Sandoval*).

ambiguity of the phrase "equal protection under the law." It does not specify or imply what it means to treat citizens equally or indicate what activities it was designed to prohibit. For example, treating individuals *equally* could mean treating them the *same*. Yet, when individuals are different, does treating them the same amount to treating them equally? If a state must educate both the special needs and average students, the state may need to treat them differently to offer them equal learning opportunities. Similarly, if a state affords significant additional benefits to a special needs student but none to an average student, who then fails, one could argue that the state has treated the average student unequally vis-à-vis the special needs student. Conversely, suppose the state does nothing for either of them, but a purely random policy incidentally makes it harder for one of them to graduate. This policy may treat one of them unfairly or unequally if there is no sound basis for the policy. Of course, these are but a fraction of the scenarios that could test the contours of equal protection.[8] The answer to whether the Fourteenth Amendment prohibits any of these circumstances is not inherent in or easily discerned from its language, but it is too often found in judges' personal notions of what it means to treat others equally or fairly.

The Fourteenth Amendment's language makes no effort to explain equal protection's meaning and, at best, delegates that task to Congress through legislative enforcement and the courts through interpretation.[9] Congress's primary effort has been through various civil rights acts,[10] which have in the last half century defined racial equal protection exclusively in terms of discrimination.[11] The Supreme Court, likewise, primarily framed equal protection in terms of discrimination beginning in the 1960s.[12] Discrimination, however, is no more self-defining than equal protection. The courts have added various qualifiers and modifiers to attempt to give discrimination some meaning, but even with additional modifiers, no meaning is inherent in the Fourteenth Amendment, the civil rights acts, or the term "discrimination."[13] Over the past two decades, and most recently in *Sandoval*, the Supreme Court instead has inserted its own

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[8] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437–39 (2d ed. 1988) (discussing equal protection's multiplicity).

[9] U.S. CONST. amend. XIV, §§ 1, 5 (supplying no explanation of equal protection but allowing Congress to do so through the "power to enforce, by appropriate legislation, the provisions of this article").

[10] *See, e.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1981 (2000)); Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000 (2000)); Civil Rights Act of 1991, Pub. L. No. 102–166 (codified as amended in scattered sections of 42 U.S.C.).

[11] 42 U.S.C. § 2000d (2000) ("No person . . . shall, on the ground of race . . . , be subjected to discrimination . . . .").

[12] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967); Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[13] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 127 (1986) (using the term "*intentional* discrimination" (emphasis added)); Craig v. Boren, 429 U.S. 190, 204–05 (1976) (adding the modifier "invidious"); Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (adding the modifier "invidious").

meaning, without any explanation or analysis, for equal protection and discrimination.[14] In doing so, the Court asserts a power to set wide-reaching social justice policy, which simply is not an authority appropriately reserved to the Court.

The goal of this Article is to articulate the intended and appropriate meaning of equal protection. The Fourteenth Amendment Framers' intent and legislative history provide guideposts for revealing equal protection's meaning and fashioning a workable standard. Unfortunately, they are but guideposts and require us to ask the fundamental questions the Court has ignored. Against this backdrop, this Article reveals how the Court's assumed and unexamined meaning has gone astray through the intent standard. Rather than reflecting equal protection's meaning, the standard lacks any basis and is but a reflection of the Court's values. Moreover, the intent standard suffers from inconsistencies in its application. The reality of these problems is now surfacing in the post-*Sandoval* era, as the Court's simplistic iterations of what amounts to discrimination are insufficient to resolve complex situations. This Article, thus, proposes a new standard of deliberate indifference that overcomes the problems of intent and reflects the original understanding of equal protection.

This Article will begin by demonstrating the recent difficulty courts have had applying the intent standard. Second, the Article will identify the source of this problem: the inherent ambiguity of relevant constitutional and statutory language and the Supreme Court's consistent failure to address the issue of equal protection's ambiguity. Third, it will turn to Fourteenth Amendment history to resolve this ambiguity and clarify equal protection's meaning. Fourth, it will show that the intent standard is inconsistent with equal protection, practical realities, and constitutional adjudication. Last, it will propose a more appropriate standard that is more faithful to the Framers' intent: deliberate indifference.

I. RECENT CONFUSION REGARDING THE INTENT STANDARD

The need to explore equal protection's meaning and whether current antidiscrimination legal standards are representative of that meaning has reached an apex. The Court's current standard disregards equal protection's meaning and, in any event, has consistently proven overly simplistic and unmanageable in application. Beginning with *Washington v. Davis*[15] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[16] the Supreme Court has focused on prohibiting intentional discrimination as a means of providing equal protection. In those cases, the Court established the intent doctrine, holding that "[p]roof of racially discriminatory intent or

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[14] *See* TRIBE, *supra* note 8, at 1512 (finding the intent doctrine has been an "avoidance tactic"); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 967–68 (1993) (noting the intent standard requires explanation).

[15] 426 U.S. 229 (1976).

[16] 429 U.S. 252 (1977).

purpose is required to show a violation of the Equal Protection Clause."[17] Thus, a plaintiff who asserts he is the victim of unequal treatment has no viable claim if he can show no more than that a policy or law affects one race more harshly than another, that such an impact could have easily been avoided, or that a much more efficient and workable policy exists. Rather, a plaintiff must show an express purpose to harm him because of his race.[18] Ironically, the intent doctrine creates a situation where the impact of the policy can often bear little relevance to whether equal protection has been denied: the de minimis nature of the harm will not prohibit a cause of action so long as the illicit purpose exists,[19] while an extraordinary harm will go unchallenged by a court so long as the harm cannot be attached to such a purpose.[20] In these respects, the Supreme Court has been unambiguous, holding only "intentional" discrimination establishes an equal protection claim.

The practical import of the intent doctrine did not fully manifest itself until recently. The Court has treated and analyzed Title VI of the Civil Rights Act of 1964 as coextensive with the Equal Protection Clause,[21] but Title VI has implementing regulations that include specific prohibitions such as disparate impact.[22] Thus, plaintiffs could pair a disparate impact claim under Title VI's regulations with an equal protection claim and broaden the scope of a court's inquiry into whether "discrimination" had occurred and put issues before a court that it otherwise would not have appropriately considered in a pure equal protection case. Consequently, lower courts were not as readily forced to draw rigid distinctions between evidence of intent and impact, and they did not display an urgent search for narrow evidence of intent.[23] They could

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[17] *Id.* at 265.

[18] *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (requiring "discriminatory purpose"); *Arlington Heights*, 429 U.S. at 266 (requiring "invidious discriminatory purpose [as] a motivating factor").

[19] Shaw v. Reno, 509 U.S. 630, 666 (1993) (White, J., dissenting) (noting that "even assuming [discriminatory purpose exists], there is no question that appellants have not alleged the requisite discriminatory effects," but the majority ruled for them nonetheless).

[20] *See* McCleskey v. Kemp, 481 U.S. 279, 297–98 (1987) (leaving racial bias in death penalty statutes unchallenged); Memphis v. Greene, 451 U.S. 100, 128, 139 (1981) (dismissing the harm as merely symbolic, even though black people had been told to stay out of the neighborhood); *see also* TRIBE, *supra* note 8, at 1512; Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 429 (2000) (imposing no liability, even though McCleskey demonstrated significant disparate impacts and bias, because he did not connect them to intent in his case).

[21] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978). Although doctrinally coextensive, Title VI also reaches non-state actors who receive federal funds. *See* 42 U.S.C. § 2000d (2000).

[22] *See, e.g.*, 12 C.F.R. § 528.9(b) (2006); 24 C.F.R. § 6.4(a)(1)(ix) (2006); 34 C.F.R. § 100.3(b)(2) (2005).

[23] *See, e.g.*, Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 (5th Cir. 1989) (allowing a case to proceed under Title VI through a disparate impact analysis); NAACP v. Med. Ctr., Inc., 657 F.2d 1322, 1324 (3d Cir. 1981) (concluding "disparate impacts of a neutral

be more comfortable in searching for and relying upon a spectrum of evidence. This is not to suggest that the availability of a disparate impact claim necessarily changes the outcome in cases, but only that it provides a means of expanding and contesting the meaning of discrimination before courts that would interpret it narrowly.[24] In other words, it prevents courts from being predisposed to conclude that discrimination does not exist simply because no smoking gun evidence or racial animus exists.

After thirty years of this broader approach, the Court in *Sandoval* cemented the implications of its prior holdings that claims purely based on "disparate impact" are dead, and left lower courts with no additional guidance as to how to evaluate its narrower intent requirement.[25] The Court summarily found that Title VI, like the Equal Protection Clause, "prohibits only intentional discrimination"[26] and thus no private cause of action exists to remedy disparate impact.[27] Its analysis bifurcated intentional discrimination from all other forms of discrimination,[28] conceptualizing discrimination as something that either falls in or out of the category of "intentional": if a policy or action falls outside the category of "intentional," it is not discrimination; if it falls inside, it is. Hence, the Court reduced a complex analysis to one that is singularly focused. Applying this analysis, the Court characterized regulations that prohibit disparate impact as going beyond Title VI's proscription of discrimination and, consequently, incapable of creating a cause of action.[29] The Court provided no clarity or substantive analysis as to equality or discrimination's meaning but merely stated

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policy may be adequate to establish discrimination under Title VI"); GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (applying a burden-shifting disparate impact analysis).

[24] For a discussion of the disparate impact standard's effect on outcomes, see Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267 (2006); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

[25] Prior to *Sandoval*, courts found that *Guardians Ass'n v. Civil Service Commission of New York City*, 463 U.S. 582 (1983), recognized a case of action for disparate impact. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70 (1992); Alexander v. Choate, 469 U.S. 287, 292–96 (1985); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Roberts v. Colo. Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993). The Court in *Sandoval* claimed it was not overruling *Guardians* because it asserted *Guardians* never created such a cause of action. Alexander v. Sandoval, 532 U.S. 275, 282–83 (2001). The Court stated that *Guardians* only "*held* that private individuals could not recover compensatory damages under Title VI except for intentional discrimination." *Id.* Thus, neither *Guardians*, nor any other case, had found that a private right of action exists for disparate impact. *Id.* However, lower courts obviously read precedent differently.

[26] *Sandoval*, 532 U.S. at 280.

[27] *Id.* at 285.

[28] *Id.* at 304–07 (Stevens, J., dissenting) (drawing a sharp distinction between regulations that the Court deems as effectuating the prohibition against intentional discrimination and those that do not).

[29] *Id.* at 292 (majority opinion).

that intent is the touchstone for a viable cause of action. The Court traded an explanation of what constitutes discrimination or the substance of a denial of equal protection for what *does not* constitute discrimination, in particular, disparate impact.[30] Thus, although the Court made it clear that precedent regarding disparate impact is irrelevant, it provided nothing in its place to help identify prohibited discrimination,[31] leaving courts still struggling with how to evaluate evidence of discrimination and what amounts to "intent" thirty years after *Washington v. Davis*.

For instance, just prior to *Sandoval*, the Sixth Circuit in *Horner v. Kentucky High School Athletic Ass'n*[32] stated that "the question of what standard to apply to determine intent when a facially neutral policy is challenged" still lingers.[33] The court found that "the only clear test in the Supreme Court is that of 'deliberate indifference.'"[34] But the court further found even that test is of no help because it arises out of the particular circumstances of sexual harassment, which are not "readily analogous" to other situations.[35]

Rather than adding clarity, *Sandoval* only complicated the question. After *Sandoval*, lower courts have struggled to reconcile previously solid causes of action and legal frameworks within *Sandoval*'s undefined parameters of intent, sometimes causing them to unravel. For example, a district court dismissed a previously recognized claim for a racially hostile environment because, as the court read *Sandoval*, "there is no private right of action under Title VI to remedy non-intentional forms of discrimination such as disparate impact and permitting the existence of a hostile environment."[36] The Tenth Circuit similarly struggled with the issue, initially rejecting deliberate indifference toward a racially hostile environment as a stand alone claim, but it then almost inexplicably found that the indifference by a defendant that permits racial hostility to continue would establish a claim of intent because "choice implicates intent."[37] Conversely, the Eleventh Circuit in *Jackson v. Birmingham Board of*

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[30] *Id.*

[31] For a discussion of the precedential gap the Court created, see *id.* at 285.

[32] 206 F.3d 685 (6th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).

[33] *Id.* at 692–93.

[34] *Id.* at 693.

[35] *Id.* The Court stated that "'intent' in [the sexual harassment] context means 'actual notice' of the abuse . . . and a failure to stop it." *Id.*

[36] *See* Bryant v. Indep. Sch. Dist., 334 F.3d 928, 929 (10th Cir. 2003) (discussing the unpublished district court decision). Prior to *Bryant*, the Supreme Court had found a cause of action for sexual harassment under Title IX in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and various decisions had held Title IX and Title VI's principles were coextensive. *See* Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982); Cannon v. Univ. of Chi., 441 U.S. 677, 694–97 (1979).

[37] *Bryant*, 334 F.3d at 932–34; *see also* Peters v. Jenney, 327 F.3d 307, 321–23 (4th Cir. 2003) (drawing a distinction between retaliation based on complaints of intentional discrimination and disparate impact discrimination, and rejecting a claim for the latter).

Education[38] felt compelled to eliminate a well-established cause of action for employees who are retaliated against when they complain of discrimination because it could not clearly fit the claim into *Sandoval*'s categorization of intentional discrimination.[39]

Other court decisions that have attempted to move beyond simplistic understandings of intentional versus unintentional discrimination have, likewise, been confused. The district court in *Almendares v. Palmer*,[40] for instance, discussed various different tests and types of evidence that have sufficed for intent, but it concluded that since few courts have revisited the issue since *Sandoval*, prior court decisions are of little help.[41] The court was ultimately unable to identify reliable guidelines for proving intent and just settled by stating, "[l]iberally construing the complaint, ... I cannot conclude, that beyond a doubt, no set of facts alleged in plaintiffs' thirty-five page Fourth Amended Complaint would entitle plaintiffs to relief."[42] The Eleventh Circuit in *Johnson v. Bush*[43] similarly surveyed various different types of evidence and relied on various precedents regarding what might amount to intentional discrimination.[44] In some respects, the Eleventh Circuit's opinion resembled a case of first impression, where the court attempts to discern a static legal principle by drawing extensively on previous examples of analogous situations or common law, yet the court still failed to identify any precedent directly on point. This panel's decision was eventually vacated on en banc rehearing, which was oblivious to the difficulty of discerning intent.[45] The en banc panel ironically concluded that precedent "establish[ed] clear standards by which to judge state action," and, thus, it "need not go into other areas of possibly analogous law."[46] But like other courts, it failed to provide any actual standard that advanced our understanding of what it means to deny someone equal protection. Instead, it merely fell back on the simplistic approach

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[38] 309 F.3d 1333 (11th Cir. 2002), *rev'd*, 544 U.S. 167 (2005).

[39] *Id.* at 1347–48. A cause of action for retaliation is consistently afforded in civil rights claims. *See, e.g.*, 42 U.S.C. § 2000e–3(a) (2000); 42 U.S.C. § 3604 (2000); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969). Even the Supreme Court was forced to reverse this reasoning. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

[40] 284 F. Supp. 2d 799 (N.D. Ohio 2003).

[41] *Id.* at 804.

[42] *Id.* at 808. The court notes that some courts have applied a test of "deliberate indifference," under which the court states that "there would be no question that plaintiffs have stated a claim. If plaintiffs' allegations are true, defendants' conscious choice to ignore or refuse to remedy the effect of their English-only policy or practice causes the disparate effect to continue." *Id.* at 807 n.5. However, the court finds that such a test is not applicable to the instant case. *Id.*

[43] 353 F.3d 1287 (11th Cir. 2003), *vacated*, 377 F.3d 1163 (11th Cir. 2004).

[44] *Id.* at 1293–99 (discussing the value of disparate impact evidence, how race can be but one factor among many, how discrimination persists across time and neutral policies, and common law intent and causation).

[45] Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005).

[46] *Id.* at 1226–27.

to discrimination and equal protection that mirrors the Supreme Court's, which as the above shows is far from clear and drives confusion.[47]

II. THE INHERENT AMBIGUITY OF THE FOURTEENTH AMENDMENT AND TITLE VI

With equal protection or "antidiscrimination" being far from new concepts and the intent doctrine being three decades old, the failure to arrive at a clear understanding of intentional discrimination is troubling, particularly in light of the potentially broad ramifications of applying inaccurate standards.[48] This reality cannot be lost on the courts. To the contrary, the Supreme Court may be too often guided by its concern with the ramifications of its standards rather than with their accuracy, fairness, or utility.[49] However, by proceeding without any analysis of equal protection's meaning, the Court suggests no ambiguity exists and renders its opinions with the false confidence that when it uses terms such as "discriminate" the Court knows what the term means and that readers understand and concur with that meaning.[50] As a result, the Court includes its own idiosyncratic assumptions regarding equality and discrimination, and, by doing so, it makes the dire mistake of overlooking the fundamental requirements of interpreting the foundational terms of our laws.[51]

A simple consultation of a dictionary shows the Court has left far too much unexamined. Standard definitions of "discrimination" range from morally reprehensible conduct of unequal treatment[52] to morally passive conduct of recognizing the difference.[53] Courts add the modifier "intentional" to the term "discrimination," suggesting a more specific meaning, but "intentional" similarly has varying definitions, ranging from acts that are calculated and studied to those that without a motive and are merely willful or conscious.[54] Thus, nothing is inherently obvious or imbedded in the constitutional and statutory language of equal protection, nor have the courts' chosen modifiers alleviated the problem. Although courts treat the terms as self-defining, they are far from being so.

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[47] *Id.*

[48] *See, e.g.*, McClesky v. Kemp, 481 U.S. 279 (1987) (allowing a death penalty system fraught with bias to continue); Washington v. Davis, 426 U.S. 229, 248 (1976) (permitting a test excluding vast numbers of minority applicants to remain in effect, while noting that another standard might invalidate a host of tax, welfare, public service, and other statutes).

[49] TRIBE, *supra* note 8, at 1502 (positing that remedial concerns were the "wellspring" of the intent doctrine).

[50] *Compare* General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004), *with* Alexander v. Sandoval, 532 U.S. 275 (2001).

[51] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

[52] *See, e.g.*, BLACK'S LAW DICTIONARY 479 (7th ed. 1999).

[53] *See, e.g.*, 7 THE OXFORD ENGLISH DICTIONARY 758 (2d ed. 1989).

[54] 4 *id.* at 1078–79; *see also* BLACK'S LAW DICTIONARY 813–14 (7th ed. 1999). The root word "intent" likewise can simply indicate that a "state of mind" exists without suggesting what the state is. WEBSTER'S II NEW COLLEGE DICTIONARY 590 (3d ed. 2005).

Discrimination, in particular, eschews any fixed or inherent meaning and instead gains its meaning from the cultural and historic context in which it is used.[55] For instance, prior to *Brown v. Board of Education*,[56] segregation was not understood as being "discrimination." However, once society became attuned to inequality following *Brown*, segregation became synonymous with "discrimination" and "discrimination" began to conjure a notion of socially unacceptable and "dirty" activity, but as public judgment swayed against "whites only" signs and violent resistance to desegregation, discrimination again changed.[57]

Even if discrimination's meaning was not culturally dependent, creating legal constructs from our conceptualization of it may be inappropriate. Although discrimination is the central concept that drives current Fourteenth Amendment jurisprudence, the term itself is conspicuously absent from the amendment.[58] The Fourteenth Amendment merely provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[59] The Court's decisions were grounded in the actual language of the amendment through at least *Brown*, and the Court anchored its inquiry to "equality" rather than discrimination.

For instance, in *Plessy v. Ferguson*[60] and its progeny, even though the Court did not further what we would currently recognize as demonstrating equality with the separate but equal doctrine, its opinions nonetheless focused on the paradigm and rhetoric of "equality."[61] The desegregation cases leading up to *Brown* were no different, reaching results different from *Plessy* only because the facts demonstrated that the separation in the particular school was not in fact equal.[62] Although *Brown* established a groundbreaking precedent, it similarly continued this equality paradigm with its famous lines

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[55] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 337 (1978) ("Congress specifically eschewed any static definition of discrimination in favor of broad language . . . .").

[56] 347 U.S. 483 (1954).

[57] DERRICK BELL, RACE, RACISM, AND AMERICAN LAW, at xix–xxii, 1 (5th ed. 2004); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91–96 (2003) (discussing the shift in the nature of discrimination from conscious animus to unconscious bias).

[58] Some earlier drafts of section one of the Fourteenth Amendment did include the term discrimination, but that language was rejected and may have been even more vague than the final text. 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, at 1272–73, 1282 (1971).

[59] U.S. CONST. amend. XIV, § 1.

[60] 163 U.S. 537 (1896).

[61] *Id.* at 542, 551–52; *see also* Cumming v. Bd. of Educ., 175 U.S. 528, 542 (1899) (finding no violation because "[s]o far as the record discloses, both races have the same facilities and privileges of attending them" and that all other matters beyond securing equal rights were social issues).

[62] McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (holding that segregative practices deprived a student of the opportunity to receive an equal qualitative education); Sweatt v. Painter, 339 U.S. 629, 633 (1950) (holding that education opportunities were not substantially equal); Mo. *ex rel.* Gaines v. Can., 305 U.S. 337, 344, 351 (1938) (holding that the state must furnish a "legal education substantially equal" to whites).

"[s]eparate educational facilities are inherently unequal"[63] and where the state provides a public right, that "right . . . must be made available to all on equal terms."[64] The real difference between these cases was not the paradigm, but rather what the Court deemed to be equal treatment. Unfortunately, this determination was a function of societal norms and, hence, empowered the Court with wide discretion that it abused in early years. In short, the Fourteenth Amendment, through what it does not explain explicitly, seemingly leaves the interpretation of equality open and has allowed the meaning of equality to vary dramatically over time. Thus, the prevailing ambiguity in antidiscrimination law is partly owed to the foundation for its authority—the Fourteenth Amendment.

A. Congress's Legislative Attempt at Definition

Although the Fourteenth Amendment on its face did not articulate a specific vision of equality, section five of the amendment provided Congress the "power to enforce, by appropriate legislation, the provisions of this [amendment]" and, thus, interpret it.[65] This interpretive power is expansive, arousing significant concern during its adoption that Congress would have a blank check to control the states in regard to their treatment of citizens.[66] Others were concerned Congress might abandon its responsibility and leave equality empty of meaning or subject to an "'accidental majority of Congress.'"[67] Although the final amendment did guarantee rights, which are not subject to congressional fiat, section five nevertheless gave Congress the authority to further specify how these rights might be protected.

Despite this wide power, Congress has failed to sufficiently clarify the gaps left in the amendment's meaning. Congress's most extensive implementation of the Fourteenth Amendment, the Civil Rights Act of 1964, still failed to define the core terms of equality and antidiscrimination.[68] In fact, the Act did not even refer to the

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[63] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[64] *Id.* at 493.

[65] U.S. CONST. amend. XIV, § 5. *But see* City of Boerne v. Flores, 521 U.S. 507 (1997) (arguing that Congress's § 5 power extends only to remedying constitutional violations, not to decreeing "the substance of the Fourteenth Amendment's restrictions on the States"). The Boerne Court went on to concede that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change . . . is not easy to discern, and [that] Congress must have wide latitude in determining where it lies." *Id.* at 519–20.

[66] FAIRMAN, *supra* note 58, at 1278.

[67] *Id.* at 1281 (quoting Rep. Giles W. Hotchkiss).

[68] See 42 U.S.C. § 2000d (2000) for the absence of any such definition; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 337–38 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (Congress "never precisely defined the term 'discrimination'"). Moreover, the absence of a definition of discrimination was of no small concern to various congressmen who were concerned that it would be misinterpreted to the detriment of their constituencies. Charles F. Abernathy, *Title VI and the Constitution:*

language of equal protection.[69] Instead, the Act shifted the legal paradigm to one of prohibiting discrimination. In Title VI, the most far reaching section of the Act, Congress provided that "[n]o person in the United States shall, on the ground of race . . . , be subjected to discrimination under any program or activity receiving Federal financial assistance."[70] Similar to the Fourteenth Amendment, however, the Act did not provide any guidance as to what amounts to discrimination or equal protection. Consequently, the Supreme Court has repeatedly indicated that Title VI is inherently ambiguous.[71]

Interestingly, the legislative history and statutory structure of Title VI reveal that the very importance and contestability of antidiscrimination terms prevented those with the task of resolving their ambiguity from doing so.[72] The legislative history consistently shows that Congress intentionally refrained from defining discrimination, and Congress itself was rather uncertain as to what "discrimination" meant.[73] Moreover, to prevent the Act from being endlessly bogged down in debate and amendments, Congress had to avoid some issues and condemn others to generality.[74] Thus, "as part of a complicated compromise," Congress deliberately avoided proscribing what discrimination entails[75] and, instead, delegated the responsibility to agencies to define discrimination's contours through regulations.[76] The Court, however, has proven

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A Regulatory Model for Defining "Discrimination ," 70 GEO. L.J. 1, 24–26 (1981).

[69] *See* Abernathy, *supra* note 68 and accompanying text. However, some congressmen, senators, and later courts presumed Title VI's meaning was but a recitation of the Fifth and Fourteenth Amendments' guarantees of equal protection. *See, e.g., Bakke*, 438 U.S. at 286–87; 110 CONG. REC. H2467, S6544, S7063–64, S12675, S13333 (1964) (remarks of Rep. Lindsay, Sen. Humphrey, Sen. Pastore, Sen. Alcott, and Sen. Ribicoff).

[70] 42 U.S.C. § 2000d (2000).

[71] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); *id.* at 622–23 (Marshall, J., dissenting) ("The word 'discrimination' was nowhere defined in Title VI." Rather, "the antidiscrimination principle of § 601 of the Act '[w]as a general criterion to follow'"); *Bakke*, 438 U.S. at 337–38 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

[72] *See generally* Abernathy, *supra* note 68, at 20–32 (revealing Congress's awareness of the ambiguity, uncertainty as to how to define it, and its ultimate "compromise" of delegating the issue to agencies). Resolving the ambiguity is challenging not simply because it is complicated, but because it broaches the most "controversial" issues. *Id.* at 4.

[73] *Id.* at 25–27.

[74] *See, e.g., id.* at 26 (discussing, for instance, the heated exchange over whether the Act would further "racial balance").

[75] *Id.* at 3, 20–39. "The Congress that considered [T]itle VI was aware of the ambiguity inherent in the word 'discrimination,' and indeed this central definitional problem set the agenda for legislative action." *Id.* at 22 ("Each executive agency responsible for implementing a nondiscrimination provision of a law covered by this Order shall issue appropriate implementing directives . . . .").

[76] 42 U.S.C. § 2000d–1, 1–402; Abernathy, *supra* note 68, at 3. Abernathy asserts Congress envisioned that this would allow the meaning of discrimination to evolve. *Id.* at 28–32, 41–42.

unwilling to respect this shift of authority to the agencies to define this all-important term.[77] Moreover, the Court has unfortunately been no more apt in advancing the understanding of discrimination or equal protection than anyone else.

B. The Supreme Court's Inability to Resolve the Ambiguity of Discrimination

The inconsistent results in the Court's Title VI cases show it has also been unable to resolve the ambiguity of discrimination. Moreover, it may not even appreciate the problem. After disposing of the simplest cases of egregious and intransigent behavior in the decade following the Act's passage,[78] the Court issued at least six opinions that offered significant interpretations of Title VI, but it still failed to establish a coherent doctrine by which to understand and apply Title VI's prohibition of discrimination.[79]

In the first case to address the scope of Title VI, *Lau v. Nichols*,[80] the Court recognized a violation of Title VI based solely upon evidence of disparate impact.[81] Yet four years later in *Regents of University of California v. Bakke*,[82] the Court seemingly held that Title VI only prohibits intentional discrimination regardless of impact.[83]

Although potentially dangerous to those who are to be protected and are in the minority, the flexibility in defining discrimination would remain politically rather than constitutionally accountable. *Id.* at 9. "Congress intended to enshrine a policy of nondiscrimination in the use of federal program funds that was to be responsive to agency expertise and to congressional political desires." *Id.* at 21.

[77] Alexander v. Sandoval, 532 U.S. 275, 291–93 (2001) (finding that agency regulations cannot expand the meaning of Title VI's prohibition on intentional discrimination); *see also* Benjamin Labow, Note, *Federal Courts:* Alexander v. Sandoval*: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205, 230 (2003) (concluding that if the issue were before the Court, it would likely hold that the regulations themselves are invalid exercises of power). Moreover, to the extent agencies have not recognized that Congress has afforded them such power and they have failed to accordingly exercise it, the courts cannot afford them weight because courts "must know which definition of discrimination an agency has chosen." Abernathy, *supra* note 68, at 4.

[78] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).

[79] *See generally* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (offering no majority or clear rule of law); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (achieving merely a judgment written by a single Justice). For the other four cases, see Alexander v. Choate, 469 U.S. 287 (1985); Grove City Coll. v. Bell, 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2000); Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Lau v. Nichols, 414 U.S. 563 (1974); *see also* Bd. of Educ. v. Harris, 444 U.S. 130 (1979) (questioning whether the Emergency School Aid Act had an impact or intent standard that should be interpreted to be congruent with Title VI and refusing to overrule *Lau*).

[80] 414 U.S. 563 (1974).

[81] *Id.* at 568.

[82] 438 U.S. 265 (1978).

[83] *See id.* at 265.

Shortly thereafter, the Court undercut any practical effect of *Bakke* by holding in *Guardians Ass'n v. Civil Service Commission*[84] that although Title VI itself only prohibits intentional discrimination, its implementing regulations create a cause of action for disparate impact and, thus, evidence of intent is unnecessary to sustain a claim under Title VI.[85] Further confusing the matter was the absence of a single majority opinion in *Bakke* and *Guardians* and twelve separate opinions between the two cases, ten of which formed some part of the holdings.[86] The Court attempted to create at least some modicum of consistency by reiterating *Guardians*' apparent disparate impact holding two years later in *Alexander v. Choate*.[87] However, the only one of these cases that even broached the ambiguous meaning of discrimination was *Bakke*, and the issue there was only raised by a few Justices, who themselves disagreed over its meaning.[88] The rest of the Court proceeded without even addressing the meaning of discrimination.[89] Thus, this line of cases is another failure to recognize and address the most fundamental questions of the Fourteenth Amendment.

Over the next twenty-five years, the Court did not even revisit the facial inconsistencies of its previous holdings much less clarify the meaning of discrimination. Finally, in *Alexander v. Sandoval*,[90] it admitted that "[a]lthough Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands."[91] The Court's analysis in *Sandoval*, nonetheless, again neglected to confront the origin of the incoherency: the inherent ambiguity of discrimination and equal protection. The Court perceived

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[84] 463 U.S. 582 (1983).

[85] *Id.* at 645 (Stevens, J., dissenting) (characterizing the majority's holding).

[86] *See Guardians*, 463 U.S. at 582; *Bakke*, 438 U.S. at 265.

[87] 469 U.S. 287, 292–93 (1985).

[88] Powell concluded that although discrimination "is susceptible of varying interpretations," *Bakke*, 438 U.S. at 284, the legislative intent is "clear" that Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment," *id.* at 287, which in his opinion were only those motivated by intentional discrimination. Brennan tied discrimination's meaning to the Constitution as well, but focused on the flexible and evolving meaning of discrimination, leaving room for the notion that Title VI and the constitution could diverge. *Id.* at 338–40 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Stevens concluded that Title VI contains "plain language" that produces a "crystal clear" ban on exclusion and answers the question before the Court. *Id.* at 412, 418 (Stevens, J., concurring in part and dissenting in part). Thus, although he recognizes discrimination was a contested term during the passage of the Act, his opinion suggests that he may not even agree that discrimination lacks an inherent meaning in the Act.

[89] Yet even those who broached the question failed to produce satisfactory answers. Their limited discussion of the legislative history and reliance on excerpts is of "dubious value." Abernathy, *supra* note 68, at 22. Their review "simplistically treats the legislative history of Title VI and obscures the complex 'dance of legislation' that produced that provision." *Id.* (quoting ERIC REDMAN, THE DANCE OF LEGISLATION 10 (1973)).

[90] 532 U.S. 275 (2001).

[91] *Id.* at 279.

the ambiguity as arising from its fractured opinions and holdings rather than the unexplored and undefined meaning of discrimination that caused the fractured decisions.[92] Thus, the Court in *Sandoval* only answered the narrow issue it framed: whether the implementing regulations of Title VI create a cause of action for disparate impact.[93]

In comparison to other antidiscrimination paradigms, the Court's consistent failure to examine discrimination and equality's meanings in race is inexplicable.[94] For instance, in recently applying the prohibition on age discrimination in *General Dynamics Land Systems, Inc. v. Cline*,[95] the Court refused to rely on any assumptions about the prohibition's meaning; it engaged instead in the most basic interpretative tasks first. The word "age" itself prompted the Court to thoroughly inquire of dictionaries, legislative history, and common usage for its meaning.[96] The Court pointed out the word's multiplicity and potential to confuse, finding that even within the applicable statute itself, age has different meanings.[97] Ultimately, the Court found that age's statutory meaning can only be accurately gleaned from the socio-historical disadvantage (determined by legislative findings) associated with age.[98] Thus, the statutory definition of age became very specific and a reflection of the barriers that Congress sought to eliminate.

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[92] The Court reconstructed its precedent in a manner that produced the result it desired. *Id.* at 279–85. The Court focused on *Bakke*'s statement that Title VI only prohibits intentional discrimination to the exclusion of precedent to the contrary. *Id.* However, the Court only accomplished this by claiming the Court had previously rejected *Lau* and that *Guardians*' recognition of disparate impact was mere dicta. *Id.*

[93] The Court did create a new paradox. The Court assumed Title VI regulations "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Id.* at 281. Thus, although disparate impact regulations are valid and agencies can enforce them, individuals cannot use them to bring causes of action. The Court, however, might declare the regulations invalid were they to come directly before it. John Arthur Laufer, Alexander v. Sandoval *and its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (2002).

[94] Justice Powell in *Bakke*, interestingly, did undertake an analysis of Title VI that mirrors the framework by which subsequent courts undertake the interpretation of other antidiscrimination paradigms. *Bakke*, 438 U.S. at 284–85 (examining the congressional intent behind Title VI by reading the statute against the "background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates"). However, although he recognized that "isolated statements of various legislators [can be] taken out of context [and] marshaled in support of [a misguided] proposition," *id.* at 284, he fell victim to this problem himself and relied on inaccurate or incomplete information. *See* Abernathy, *supra* note 68, at 20–32 (stating that Congress did not intend Title VI merely to immolate the Constitution).

[95] 540 U.S. 581 (2004).

[96] *Id.* at 591, 594.

[97] *Id.* at 597–98; *see also id.* at 596 ("'age' is th[e] kind of word" that "has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation").

[98] *Id.* at 596.

In *General Dynamics*, the Court ironically begs the question why it has never engaged in such inquiries in regard to race. The Court wrote that its primary job in interpreting discriminatory prohibitions is to "seek[] the meaning of the whole phrase 'discriminate . . . because of such individual's'" membership in a protected group.[99] It then specifically recognized that race discrimination poses an even greater ambiguity than age discrimination, writing "the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex," because "'[r]ace' and 'sex' are general terms that in every day usage require modifiers to indicate any relatively narrow application."[100] Thus, by the Court's own logic, to avoid these fundamental inquiries in race is to embrace significant flaws in its analysis. Its conflicting Title VI opinions make these flaws the law. If the Court is ever to resolve this problem, it must return to the problem's source—equal protection's ambiguity—and attempt to give it a meaning grounded in the Framers' understanding.

III. THE FRAMERS' MEANING OF EQUAL PROTECTION

Without question, no easy solution to the ambiguity of equal protection exists. This may be why the Court has chosen to avoid the issue and instead fashion standards disconnected from equal protection's substance. However, as the prior sections demonstrate, the problems and inconsistencies in equal protection jurisprudence cannot be resolved by merely referring to the amendment's facial language, precedent, or modern congressional interpretation. So long as we rely on these insufficient sources, the problems and inconsistencies of equal protection will continue to manifest themselves. Thus, although it may seem odd or ironic to do so a century and a half after the amendment was enacted, we must begin our equal protection analysis anew in a search for its substantive meaning.

The starting point for determining what the Fourteenth Amendment means and prohibits, like any other antidiscrimination paradigm, is an assessment of the ends the Framers sought. Its exact meaning may not immediately spring forth from history, but it is still discernable.[101] However, to arrive at that meaning, we must fairly take account of the peculiar barriers one will confront in interpreting the Fourteenth Amendment's history.[102]

First, the Framers and ratifiers included numerous people in both the federal and state governments, many with divergent agendas and perceptions, and who were

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[99] *Id.* (ellipsis in original).

[100] *Id.* at 597–98.

[101] For examples of the need to interpret the intent of older amendments, and the difficulty in doing so, see Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 657 (1989) (Kennedy, Rehnquist, White & Scalia, JJ., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38 (1985).

[102] Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368, 370 (1972) (noting Fourteenth Amendment interpretation is a historical rather than judicial or legal function).

drafting during a period of unprecedented turbulence.[103] It could not have held the same meaning to them all. Second, the historical record is littered with evidence that in many respects points in various directions.[104] Consequently, some declare that "[h]istorical scholarship on the adoption of the Fourteenth Amendment is now at an impasse."[105] Third, the problem is even more pronounced when determining whether the amendment was intended to prohibit some specific activity such as school or housing segregation, because most often such issues were unimagined during framing or did not become significant issues until later.[106]

The primary explanation for why history is sparse as to specific applications is that the Framers' and country's attention was focused on broader issues of equality and much cruder forms of discrimination than exist today.[107] Congress, however, premonitorily avoided limiting the amendment to immediately apparent forms of disadvantage by enacting transcendent language that reached a breadth of issues. Congress specifically rejected the urge to delve into a taxonomy of discriminatory or disadvantaging prohibitions[108] and instead focused on fundamental guarantees of life, liberty, property, privileges, immunities, and equality.[109] Thus, Congress did not—and generally could not—consider applications of equal protection, much less analogous ones, with the depth necessary to resolve our contemporary applications.[110] Fortunately, the amendment's guarantees of "life" or "equality" made it unnecessary, because these guarantees would prohibit any number of future and unknowable impositions on citizens. This understanding and solution, although open ended, is exactly what Congress foresaw.

Revealing the above does not suggest that the legislative history is unhelpful, but recognizes its limits. Once one refrains from expecting answers to questions that the Framers could not provide or imagine,[111] the amendment's history can be illuminating. The Framers assigned important meaning to equal protection and enacted the amendment with some clear purposes in mind. The history reveals many points upon which the Framers did agree, provides a cultural understanding of those points and,

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[103] John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 432.

[104] HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 275 (1968); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 4–5 (1988); Frank & Munro, *supra* note 103, at 432; Kaczorowski, *supra* note 102, at 387.

[105] NELSON, *supra* note 104, at 4.

[106] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) (conceding that the Framers' intent toward school segregation cannot be determined); *see also* Kaczorowski, *supra* note 102, at 371 (discussing how we confuse the problems of today with those of yesterday).

[107] Frank & Munro, *supra* note 103, at 450.

[108] GRAHAM, *supra* note 104, at 276.

[109] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866). You "prohibit murder in the Constitution" by "guarantee[ing] life." *Id.*; GRAHAM, *supra* note 104, at 276.

[110] Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976); Kaczorowski, *supra* note 102, at 371.

[111] NELSON, *supra* note 104, at 6.

consequently, offers a concept of equal protection that serves as the appropriate guide for applying it today.

A. The Amendment's Unique Language, Audience, and Idea

As an initial matter, a crucial step in interpreting the Fourteenth Amendment is to recognize that the Framers' use of language is substantively different than our own, particularly in regard to their approach to legislative drafting. Precise and clear legal meaning is a general goal in drafting modern laws, but precision was not the goal for the drafters of the post-war amendments.[112] Rather than speaking solely in a "legal" language, the Fourteenth Amendment spoke on multiple levels. The Framers drafted the amendment to speak on normative, ethical, and natural rights levels.[113] Thus, the Framers' intent and the amendment's meaning must be conceptualized beyond a mere legal construct.

The final language of section one of the Fourteenth Amendment and the procedural steps in its adoption, likewise, reinforce the notion that it encompassed a broader meaning. First, if the meaning was solely legal, the amendment's phraseology would have been drafted to minimize or lessen its ambiguity.[114] At the very least, the legal context of the times would have provided connotation and substance from which the amendment could be interpreted more definitely, but this was not the case. Instead, the language was legally ambiguous yet readily understood by the public at large.[115] The public and congressmen certainly disagreed amongst themselves in some respects as to its legal import and impact, but they all nevertheless had their own firm, individual conviction as to its substantive meaning.[116] The only doubt was over how others would later interpret and apply it. In essence, the "matrix" and language of equal protection was that of laymen rather than the "sophisticated constitutional [language of] lawyers and judges."[117] To the layman, the amendment constituted an expression of ethical principles and natural rights, regarding which everyone had an opinion.[118]

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[112] *See* EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION, at viii (2003) (admitting that almost all scholars believe the Drafters intentionally avoided articulating a clear legal meaning); *see also infra* notes 115–20 and accompanying text.

[113] *See infra* notes 121–28 and accompanying text.

[114] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 257 (1988) (noting that Congress rejected the proposal to give the amendment more precision).

[115] GRAHAM, *supra* note 104, at 317 (finding that the Framers appreciated the ambiguity, which could not be negated without upsetting the varying factions); NELSON, *supra* note 104, at 143 (noting Sumner's acceptance of varying interpretations).

[116] GRAHAM, *supra* note 104, at 237, 285 (stating that the amendment's language was that of lay opinion and morals rather than law and that its meaning was developing from the base of society rather than the top); NELSON, *supra* note 104, at 60 (showing that section one of the amendment was at the center of public discourse as a declaration of natural rights).

[117] GRAHAM, *supra* note 104, at 237; *see also* Kaczorowski, *supra* note 102, at 370 (indicating the amendment's meaning must be understood historically rather than legally).

[118] NELSON, *supra* note 104, at 60 (discussing wide public discourse around the amendment).

The ratification included the submission of the amendment to the states. During this time, the meaning and intent of the amendment was ethically, morally, and legally discussed at length among the legislatures and populace, most of which were not lawyers or judges.[119] To them, section one was more than just a legal instrument; it was "a declaration of fundamental principle—of the meaning of American citizenship and nationality" and necessarily "in the center of public discourse."[120] Knowing this would be the case, the lawyers and congressmen who drafted and debated the amendment "did not design it to provide judges with a determinative text for resolving this conflict in a narrow doctrinal fashion. They wrote the amendment for a very different audience and purpose: to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule."[121]

In making this case to the people, nation, and each other through the Fourteenth Amendment, the Framers translated ethical and natural rights principles into law.[122] Whether those ethical and natural rights principles could and should have been translated into law and what that translation would have meant, inevitably, is where disputes regarding Fourteenth Amendment interpretation and history begin to arise.[123] For the Framers themselves, the translation was inherently difficult as they crystallized undefined, relative, and flexible "higher" principles into concrete and static law. In fact, this difficulty necessitated the amendment's ambiguous language and precluded more legal clarity.[124]

The translation of the ethical into legal creates other unassailable problems. Defining the exact contours of any meaningful ethical principle to which a majority agreed is nearly impossible. Ethical principles tend to reflect individual predilections, which are generally contested rather than neutral principles. As a result, scholars have long since cautioned against deriving legal principles from ethical principles or attempting to infuse legal principles with ethics.[125]

The translation of ethics into law also presents a practical problem. Insofar as ethics are relative or ambiguous, the ethical principle (equal protection in this case)

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[119] FAIRMAN, *supra* note 58, at 1299 ("'The people of this state are thoroughly familiar with its provisions . . . .' 'I need not discuss the features of this amendment; they have undergone the ordeal of public consideration . . . they are understood, appreciated, and approved.' 'No public measure was ever more fully discussed before the people [or] better understood by them . . . .'" (citations omitted) (first ellipsis in original) (quoting Governor Fairchild of Wisconsin, Governor Fenton of New York, and Governor Morton of Indiana)).

[120] NELSON, *supra* note 104, at 60.

[121] *Id.* at 8.

[122] *See, e.g.*, Kaczorowski, *supra* note 102, at 378–80 (discussing congressmen's intent to secure natural rights through laws and protect them from state infringement).

[123] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 50–58 (1980) (critiquing an ethical concept of law making); GRAHAM, *supra* note 104, at 286, 295 (discussing the decline in natural rights and ethics concepts in law in the postwar period).

[124] GRAHAM, *supra* note 104, at 304.

[125] *See supra* note 123.

may have no independent and immediate power other than that which we agree to give it. The history of equal protection particularly exemplifies this point: within a short time of enactment it offered no protection for women or blacks, but a century later it was a tool that reshaped our country.[126] However, the great promise of equal protection is that the words of the amendment always remain "'engrossed on parchment'" until we seize their inherent "power to keep [our] government in order."[127] Again, constitutionalizing such a measure may be unwise, but the Framers did not reach the final language of section one by mistake. They knew the language was ambiguous and susceptible to varying interpretations,[128] but only language of this nature could embody the meaning they sought. Only this language could please the varying factions within the Republican Party and elicit acceptance from the masses.[129]

The above described magnitude of the Framers' task is the difficult, but necessary, backdrop for any evaluation of equal protection's meaning. The firm footing or contours that we often seek for applying equal protection cannot be found in this backdrop, but it does begin to give us an appreciation for the amendment's meaning. The backdrop reveals that equal protection cannot be understood as a narrow legal prohibition. Rather, it is a legal prohibition that embodies a much larger principle. In short, *equal protection is an idea.*[130]

B. The Ends the Framers Sought

Although history cannot give us the specific and precise prohibitions of equal protection, aspects of the Framers' intent and purpose are clear and can provide a substantive understanding of the "idea" of equal protection. First, equal protection was intended to prohibit class legislation that singles out a group or caste for unfair treatment.[131] The South did so in the past and showed no inclination toward voluntary change.[132] Second, section one of the Fourteenth Amendment, with its due process,

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[126] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948); *see also* FONER, *supra* note 114, at 252 (noting that the Fourteenth Amendment did not initially change the status of women in the country).

[127] GRAHAM, *supra* note 104, at 6–7; Kaczorowski, *supra* note 102, at 370.

[128] FONER, *supra* note 114, at 257 (indicating that Congress had rejected the call to define the amendment more precisely); GRAHAM, *supra* note 104, at 317; NELSON, *supra* note 104, at 52–54, 80, 143.

[129] FAIRMAN, *supra* note 58, at 1295–96 (discussing the possibility the amendment would become overloaded with amendments or fall apart for want of agreement); NELSON, *supra* note 104, at 21, 51–54.

[130] NELSON, *supra* note 104, at 7 (finding that the Framers' understanding of equal protection existed on a conceptual, rather than doctrinal, level).

[131] *Id.* at 117.

[132] FAIRMAN, *supra* note 58, at 1297 (noting the "'diseased appetite' of Southern communities to deny 'to a large portion of their respective populations the plainest and most necessary rights of citizenship'" (quoting Sen. Timothy Howe of Wisconsin)); FONER, *supra* note 114,

privileges, immunities and equal protection working interrelatedly, solidified an entirely new set of individual rights.[133] The states' previous authority to treat citizens indiscriminately and arbitrarily was vanquished with the right to affirmative due process and equal protection, which guaranteed a reasonable relationship between citizens and the state. Most important, section one was generative for blacks, "creat[ing] liberties for a vast class which did not have them at all."[134]

Third, the Fourteenth Amendment was designed as part of a series of measures that could reunite and invigorate a war-broken country toward a new political and social order. To achieve this, the North needed to define the terms upon which the South could be brought back into the Union. The Fourteenth Amendment was a peace treaty to secure the fruits of war; its specific provisions, including equal protection and due process, were part of the plan for correcting the errors of the old union and rehabilitating it for the future.[135] The new amendment would promote a congruence between the North and the South that would limit the states' previously unchecked discretion as to how they would treat their citizens, which ultimately brought a calamitous war upon the country.[136] Thus, section one limited the freedom of the states. Equal protection and due process would police the states' political and governmental processes.[137] Likewise, citizens could question how government is run and demand that it treat them in a manner consistent with principles couched in the amendment: fairness, equality, and reason.[138] In this respect, section one constitutionalized those aspects of a republican government that the people expected and assumed but which were previously insecure in the hands of the states.[139]

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at 258–59 (noting that the Fourteenth Amendment was necessary to stop the previous abuses of individual rights in the South).

[133] Whether these rights in regard to whites were absolute or relative rights (meaning that the Fourteenth Amendment generated additional rights in particular states or only policed those rights that were already extended) is a matter of debate, but no question exists as to whether some form of new rights were created for whites.

[134] Frank & Munro, *supra* note 103, at 428; *see also* GRAHAM, *supra* note 104, at 5.

[135] FAIRMAN, *supra* note 58, at 1275–77, 1279–86 (framing the Fourteenth Amendment as the measure to cure the "defect" in the previous constitutional structure); FONER, *supra* note 114, at 258 (discussing the Framers' intent to remedy the unbridled power of the states and carry forward the rebuilding of the nation); NELSON, *supra* note 104, at 61, 110–11; Frank & Munro, *supra* note 103, at 424.

[136] FAIRMAN, *supra* note 58, at 1279–80, 1285–86, 1288 (discussing the recognition in Congress that the states had been acting "unconstitutionally" towards their citizens and this could only be stopped by creating the constitutional power to make the states "behave"); FONER, *supra* note 114, at 258–59 (discussing the intent to limit the power of the states, which had been misused).

[137] FAIRMAN, *supra* note 58, at 1279–80; *see also* ELY, *supra* note 123.

[138] Kaczorowski, *supra* note 102, at 388 (arguing the amendment went beyond just prohibiting class legislation to changing and policing the legal and political process).

[139] Section one goes to the heart of "how" a republican government should govern its people, ensuring that it "protect[s] all men in the right to life, liberty and property . . . and give[s]

Finally, section one of the Fourteenth Amendment was designed to be a change agent, not a continuation of the status quo. It elevated an entire class of former slaves to a different position in society and permanently guaranteed that they would be entitled to rights and protections equal to that of others.[140] The amendment overthrew an entire regime of oppression and inequality. Although not to the same extent, many disempowered whites also saw their positions upwardly altered.[141] It was, thus, an epochal time of unparalleled and extraordinary progress.[142]

In translating ethics into law through the Fourteenth Amendment during this epoch, the Framers could not have projected all the practical results precisely, but they expected and knew that significant change was necessary.[143] For instance, they believed, even in the time immediately following slavery, that discrimination and prejudice could be eradicated by the law.[144] In fact, the potential for this revelation generated the most consistent opposition toward the amendment.[145] Similarly, the far-reaching scope of the change was one of the major loci of contention.[146] In short, the country

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equal and exact justice to all men." NELSON, *supra* note 104, at 74; *see also* FAIRMAN, *supra* note 58, at 1299 (the amendment was "'[s]o manifestly an axiom of free government as to preclude the necessity of argument'") (quoting Governor Bullock of Massachusetts); FONER, *supra* note 114, at 258–59 (noting the amendment would secure the new rights that had been "systematically violated in the South"). *See generally* ELY, *supra* note 123.

[140] GRAHAM, *supra* note 104, at 5 (noting that prior to the amendment's enactment freedmen were still without any rights, protection or process). *See generally* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 302–05 (3d ed. 1967) (describing the Fourteenth Amendment as a response to the need to elevate the freedman from slave to citizen).

[141] FONER, *supra* note 114, at 257–58, 260 (noting that rights were permanently changed for all Americans and that the South had likewise abused loyal whites); Frank & Munro, *supra* note 103, at 427–28 (positing that the amendment was generative in respect to rights rather than just protective); Kaczorowski, *supra* note 102, at 375–76 (discussing the problem of white suffrage as well as the rights of blacks).

[142] NELSON, *supra* note 104, at 44–45; Frank & Munro, *supra* note 103, at 432; *see also* FRANKLIN, *supra* note 140, at 297–301 (describing this period as one altering the "whole fabric of American life").

[143] *See, e.g.*, NELSON, *supra* note 104, at 9 (finding that Congress was transferring morals into law with the hope that this would change others' conduct, but Congress did not know how the changes to the law would apply to exact situations); *id.* at 145 (expressing Congress's concern with the immediate conversion of others to their acceptance of equality, but the lack of a vision of what it would mean further into the future); *see also* Kaczorowski, *supra* note 102, at 387 (finding that a definitive statement of the rights Congress sought to protect is impossible).

[144] GRAHAM, *supra* note 104, at 20, 315.

[145] NELSON, *supra* note 104, at 96–97.

[146] *See, e.g.*, NELSON, *supra* note 104, at 10, 114–15, 121 (discussing the concern that the federal government would commandeer the states); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); FAIRMAN, *supra* note 58, at 1298–99 ("'New and enormous powers will be claimed and exercised by Congress . . . and the whole structure of our Government will perhaps gradually but yet surely be revolutionized. . . . If the proposed amendments be adopted, they may and certainly will be used substantially to annihilate the State judiciaries.'" (quoting

was changing intentionally and extraordinarily through force and law, laying waste to old ways so quickly that it was hard to even gauge the extent to which such change was occurring.[147]

Unfortunately for our current interpretative purposes, both the change and the Framers' determination of the exact ways in which equality would become a reality were just beginning.[148] The most comprehensive statement that might be said of equal protection is that it was not a finished idea. It was drafted in its present, but designed to fulfill an uncertain future,[149] which leaves us with two choices as to how to treat it. Either we interpret equal protection as only a general and empty promise because we do not care to give it a full meaning; or we infuse equal protection with meaning, a process that legal scholars abhor but the Framers fully envisioned.[150] The only choice consistent with Congress's intent is the latter.

However, a meaning consistent with the Framers' intent cannot be a narrow notion because Congress's intent was complex. It sought to enshrine a transcendent principle of equality, the understanding of which had just begun.[151] As that understanding would apply to evolving circumstances over time, it might very well prohibit activity Congress originally would not have prohibited because Congress was concerned with principles, not specific prohibitions.[152] For instance, although Congress had taken no clear stance toward segregation during the framing of the Fourteenth Amendment, when segregation subsequently became a significant issue, some believed that equal protection must prohibit it by its facial mandate, albeit grudgingly.[153] Thus, our task is to understand the principle, and the prohibitions will then fall where they may.[154]

Orville Browning)).

[147] Frank & Munro, *supra* note 103, at 432 (discussing the rapidity of change and the difficulty in determining exactly what Congress did or did not intend to prohibit). *See generally* FRANKLIN, *supra* note 140, at 297–301 (describing this period as one altering the "whole fabric of American life").

[148] NELSON, *supra* note 104, at 38 (indicating that Congress had understood its task to be the translation of the political rhetoric of equality into law, but that the task of developing a precise body of law was left to the courts).

[149] GRAHAM, *supra* note 104, at 338 (indicating that constitutions and the Equal Protection Clause were drafted for the future); Kaczorowski, *supra* note 102, at 386.

[150] TRIBE, *supra* note 8, at 1436 ("[E]quality makes non-circular commands and imposes non-empty constraints only to the degree that we are willing to posit substantive ideals to guide collective choice.").

[151] NELSON, *supra* note 104, at 63.

[152] FONER, *supra* note 114, at 258 ("Even moderates . . . understood Reconstruction as a dynamic process, in which phrases like 'privileges and immunities' were subject to changing interpretation. They [wanted] to allow both Congress and the federal courts maximum flexibility in implementing the Amendment's provisions and combating the multitude of injustices that confronted blacks . . . .").

[153] NELSON, *supra* note 104, at 133.

[154] *Id.* at 7 (finding that the Framers' understanding of equal protection existed on a conceptual rather than doctrinal level).

Moreover, were we to attempt to identify the Framers' intent regarding prohibitions, we would find a version of equal protection at odds with our plain reading of the amendment in some respects. In fact, insofar as this version of equal protection would be a stilted one grounded in specific prohibitions rather than an idea capable of evolving, it would likely produce a version of equal protection to which the Framers would have objected.[155]

History also shows the folly of considering equal protection as only a general and empty promise. When Reconstruction concluded and political power shifted, a mere general promise of equal protection was insufficient to prevent the wholesale unequal treatment of blacks and other disempowered groups.[156] Such treatment generally continued unabated until the Supreme Court was compelled to shrug off this understanding of equal protection in *Brown v. Board of Education*. Although the Court claimed to be without the aid of reliable legislative history on the point of school segregation, the Court ironically employed the type of forward-looking meaning of equality that the Framers had envisioned.[157] Rather than resting the issue on the specific original intent (or lack thereof) regarding school segregation, the Court articulated the meaning of equal protection and its attendant rights "in light of [their] full development and [their] present place in American life throughout the Nation."[158] Hence, the Court implicitly recognized that equal protection was designed to alter the way the government relates to its citizens and that, as the government, its capacities, and the society in which it operates change, so too must the application and understanding of equal protection. As Holmes wrote in 1881, equal protection of the law "must grow in relevance and fulfillment with 'the felt necessities of the times, . . . prevalent moral and political theories, intuitions of public policy'—*ours* and our childrens'; as well as our ancestors'."[159]

C. The Guarantee That All Would Have Equal Value Before Government

Since neither a legal standard nor prohibition was part of the Framers' deliberations, the only way to do justice to the Framers' intent in our search for an appropriate equal protection standard is to understand what their "idea" of equal protection meant.[160] Then we should use that idea to sculpt a standard within our modern context.

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[155] *See supra* notes 147–51 and accompanying text; *see also* Kaczorowski, *supra* note 102, at 395 ("That society in 1866 did not include desegregated schools and juries within its conception of civil rights does not necessarily mean that it stopped short of assembling full national power over whatever rights it did include within that right.").

[156] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); FONER, *supra* note 114, at 587–601; PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 119–31 (1984).

[157] Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

[158] *Id.* at 492–93.

[159] GRAHAM, *supra* note 104, at 292 (citation omitted) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881)).

[160] NELSON, *supra* note 104, at 7–8 (finding that for the Framers, equal protection was a

A standard that also reflects our modern, national understanding of what equal protection means is consistent with the Framers' expectation of what equal protection would become. With the above serving as a backdrop, we now finally turn more directly to attempting to articulate what the "idea" of equal protection means.

By the time of the Fourteenth Amendment's enactment, the country had learned that equality could not rest upon the better senses of men. For nearly a century following the Declaration of Independence, our republican form of government simply had not lived up to the standards of its form or self-executed the self-evident truths articulated in the Declaration.[161] It was far too easy for the government to be a "respecter" of men and for the majority to pay homage to itself while neglecting the minority.[162] Thus, for the principle of equality to become a reality, it was essential for the law to protect it. Such an affirmative form of equality was exactly what the Framers intended because, as Congressman Fernando Beaman of Michigan aptly expressed, "no man can be sure of the preservation of his own rights unless every other man is also protected. The practice of wrong upon one man implies that injustice may be done to another. . . . Every man's safety consists in the maintenance of laws that shall protect every other man."[163]

Of course, the rights of the minority, not the majority, had been those in jeopardy. Equal protection was designed to create parity between the two by inextricably tying the legal rights of the minority to those of the majority through law. Consequently, whatever rights, respect, or privileges were afforded to the majority would likewise be afforded to the minority.[164] Equal protection, however, was not intended to guarantee the same results for every aspect of society, but it would guarantee that, at the least, the government would give *fair and equal consideration* to all it citizens, blacks in particular.[165] Thus, the government could no longer be heard to say that it cares not whether the police bother to investigate violence against blacks or whether government services are extended to their neighborhoods. Times inevitably arise when only limited resources exist to provide services, and those services are ultimately devoted predominantly to the majority. However, equal protection dictates that the cause cannot be that government did not bother to consider equally the need of blacks, that the whites'

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concept, not a doctrine, intended to provide judges with a context for resolving issues in a narrow fashion).

[161] *See supra* notes 15–47 and accompanying text; *see, e.g.*, Kaczorowski, *supra* note 102, at 378–80 (discussing the purpose of the amendment as securing those fundamental and natural rights that the states had failed to protect).

[162] ELY, *supra* note 123, at 78, 103 (noting our sordid tradition of abusing the minority and the inherent pressures to disadvantage them in favor of the majority); *see also* THE FEDERALIST NO. 39 (James Madison) (discussing that the need to have a government comprised of various sections of society rather than of the elite class, which would undermine our republicanism).

[163] NELSON, *supra* note 104, at 78–79.

[164] ELY, *supra* note 123, at 84.

[165] *Id.*; *see also* NELSON, *supra* note 104, at 73 (Sen. John Bingham initially argued that "the spirit, the intent, the purpose of our constitution is to secure equal and exact justice to all men").

interest inherently outweighs theirs, or that the government does not think blacks are in need of such services. Rather, the reason must be that all groups' needs were given equal consideration or weight, but that some other neutral or legitimate consideration compelled the decision.

Unfortunately, experience and reason have shown that the political process will not willingly and consistently afford the governed equal consideration and value. An inherent pressure to disadvantage the disempowered exists and, even with legal checks, the pressure will consistently motivate those in power to stretch the bounds of acceptable behavior.[166] Although the courts and the Framers were wary of anti-majoritarian power and second guessing the legislative process, they knew that majorities are prone to treat fellow citizens unfairly and, at times, nothing short of the power of the law can protect the disaffected.[167] The same concern of majority tyrannization of the minority through government weighed heavily upon our founding fathers, which prompted them to enact our system of representation with checks and balances to avoid this threat on the national level.[168] However, prior to the Civil War, no measure existed to police such activity on the state level. Thus, the states, ironically, could visit evils on their own citizens that the federal government could not visit on the states,. The Fourteenth Amendment, however, extended the concerns of our founding fathers to the states by serving as a tool with the inherent and central power to overrule and second guess the majority's values.[169] Of course, the Framers did not intend to create the free reign to supervise and overrule the states in every respect, but they did want to limit those activities that were contrary to their notion of equality and fairness.[170]

As the following shows, this notion of equality and protection revolves around a few core fundamental principles and prohibitions. First, equal protection requires that the "bounties" of government, including resources and representation, are extended to all citizens, not just some.[171] The Framers certainly did not intend that each citizen would have a claim to an exact equal share of the government bounty, but they did intend that the government would benefit all citizens and not operate to divert resources

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[166] ELY, *supra* note 123, at 78. For examples of what white majorities have done to other whites in voting, see Reynolds v. Sims, 377 U.S. 533 (1964) and Baker v. Carr, 369 U.S. 186 (1962).

[167] *See* Ervine's Appeal, 16 Pa. 256, 268 (1851); ELY, *supra* note 123, at 81.

[168] *See* THE FEDERALIST NOS. 10, 47 (James Madison) ("The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."), NO. 51 (Alexander Hamilton).

[169] *See* ELY, *supra* note 123, at 32, 69.

[170] *See id.* at vii (objecting to the competing notions that we must either interpret the Fourteenth Amendment as only prohibiting a narrow range of activities that the Framers would have prohibited or as allowing the law to simply second guess every legislative choice); *see also* TRIBE, *supra* note 8, at 1436 (suggesting that equality necessarily places "constraints upon the substantive choices that political majorities and their representatives might feel strongly inclined to make").

[171] GRAHAM, *supra* note 104, at 8.

to the few or the controlling class.[172] All citizens should have an equal right to call upon the government's representation and bounty, and that demand must be given equal weight. To surmise that equal protection secures anything less would give constitutional sanction to a system of tyranny and exploitation.

This concept of equal protection was prevalent in Congress leading up to and during the enactment of the Fourteenth Amendment. Even prior to abolishing slavery and recognizing any formal rights for blacks, Congress debated its allocation of education funds in the District of Columbia, and the Republicans demanded that the city refrain from using the funds solely for whites and use at least some for blacks.[173] As Senator Harlan declared, "[T]axing blacks for the exclusive benefit of the white children . . . would be a kind of legal robbery."[174] To govern otherwise would be a blatant refusal to administer government bounties to all. This concern also manifested itself several times during Reconstruction when the issue arose whether whites, in addition to blacks, should be extended the basic necessities that the federal government was offering in the South through the Freedmen's Bureau.[175] Again, Congress objected to the idea (albeit for possibly different reasons) that the government could or should exclude anyone with a legitimate need from receiving these benefits. Thus, although the programs were created for the newly freed slaves, Congress allowed white Southerners, both loyal and disloyal to the Union, to receive benefits from the Bureau.[176]

Second, the Framers intended equal protection to remove the influence of racial bias from the governmental processes, which is distinct from removing class legislation.[177] We now have the benefit of knowing that racial bias has many forms, including racial hatred, prejudice, dislike, indifference, favoritism, ignorance, and various other forms.[178] However, rather than wrestle with these distinctions, the most representative explanation of the Framers' expectations is that they believed one's race should not serve as a disadvantage, either explicitly or implicitly.[179] Biases can be subtle, subconscious, or patent, but all can work to significantly disadvantage a racial group. Thus, setting equal protection's threshold prohibition at whether a racial bias is

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[172] *Id.*; MALTZ, *supra* note 112, at 21.

[173] *See* MALTZ, *supra* note 112, at 21.

[174] *Id.* (citing CONG. GLOBE, 36th Cong., 1st Sess. 1681 (1860)).

[175] Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 796 (1985).

[176] *See id.*

[177] *See* GRAHAM, *supra* note 104, at 20, 305.

[178] *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 323 (1987).

[179] *See* GRAHAM, *supra* note 104, at 9 (Congress did not want to "*indulge* slavery's hangover").

significant enough to disadvantage a group is consistent with both the Framers' intent and current reality.

In addition, for equal protection to have any significant meaning beyond the time of its enactment, the racial bias that Congress intended to prohibit must be conceptualized in a broad enough sense to allow it to evolve. The nature of bias has continually changed since Congress enacted the Fourteenth Amendment. As it changes, our appraisal of what amounts to bias, likewise, changes, yet that appraisal is unfortunately susceptible to error. For instance, both the Fourteenth Amendment's proponents and detractors harbored serious racial biases. Many members on both sides of the aisle believed blacks to be inferior, incapable of wielding the vote or in need of the white man's paternalism; but they deemed these to be empirically grounded facts and far from evidence of bias.[180] Today, we perceive these notions to be racial biases that obviously violate equal protection, but what we perceive as obvious would have been subtle to even the most progressive thinking Framers. Thus, yesterday's mere "bias" may later be recognized as today's "hatred."

In addition, to the extent Congress spoke to some limited specific applications, these applications reveal biases that are at odds with the plain language of the Fourteenth Amendment. For instance, Congress did not find various types of unequal treatment of women problematic.[181] The same could be said of some types of racial segregation or deprivation of the right to vote.[182] Although Congress may not have consciously intended to prohibit these practices, today's uncontested plain reading of the language of the Fourteenth Amendment squarely prohibits denying women the right to practice law, or denying a citizen the right to vote or attend a school based on race, ethnicity, gender, or land ownership. In enacting the amendment, the Framers held personal biases that were at odds with the natural extension of their own idea or principle of equal protection, but today we reject their personal biases by ultimately giving life to their idea of equal protection.[183]

Congress, moreover, had no intention to enact a static concept, but was beginning the process of driving toward a higher standard of equality and recognized that racial bias stood in the way.[184] Congress did not delve into the gradations of bias because although they intended to remove it from the political process, the end toward which it was directed was fostering equality. Thus, it would be counterintuitive to assume that the Framers would have acquiesced in allowing inequality to persist simply because they did not appreciate the complete or changing nature of bias.[185] In short, the Framers

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[180] NELSON, *supra* note 104, at 87, 97.

[181] *Id.* at 165–66.

[182] *Id.* at 61, 125.

[183] Kaczorowski, *supra* note 102, at 386 (articulating the problem with the *Brown* Court's search for legislative intent was that it expected the Framer's history to provide a reliable perspective on today's problems).

[184] NELSON, *supra* note 104, at 63; *see also* GRAHAM, *supra* note 104, at 6, 9, 284–85. "Section one was . . . designed to effect [a] transmission from the 'ought' to the 'is.'" *Id.* at 304.

[185] If eliminating facial bias did not bring an end to the degregadation of blacks, Congress

sought to prohibit racial bias in whatever form resulted in disadvantage in the political process or access to public goods. We can look back now and see that their specific recognition or appreciation of racial bias, at times, would have done injustice to "equal protection." However, the point for understanding equal protection today is that we should not rest easily with the possibility that we too lack understanding as to current forms of bias and might later frown upon ourselves for having erred. In giving equal protection its intended meaning, we must understand bias and disadvantage in the broadest sense.

All of the foregoing values, principles, and expectations can be reduced to one fundamental concept of equal protection: all are equally entitled to the consideration and protection of the law. Consequently, the interests of none are denied value or afforded a differential value when the government weighs competing interests or ends, particularly in regard to race. Even the infamous decision in *Roberts v. City of Boston*,[186] which later served as a basis for the Court's holding in *Plessy*, recognized this fundamental premise of equal protection though it failed to give it practical meaning in its holding. The court wrote that equality before the law required "that the rights of all . . . are equally entitled to *the paternal consideration and protection* of the law, for their maintenance and security."[187] It is the failure of equal consideration that strikes at the heart of equal protection. This failure can be obvious when it is motivated by animus or far more subtle when it lacks motivation and is a result of "racially selective sympathy and indifference"[188] or unconscious feelings of differential worth between racial groups.[189] On their face, decisions may appear legitimate when they are actually the result of "the unconscious failure to extend to a minority . . . the same sympathy and care, given as a matter of course to one's own group."[190] Although selective sympathy or indifference and differential appraisals of worth are difficult to identify, they are no less pernicious to the Fourteenth Amendment's guarantee of "equal concern and respect in the design and administration of the political institutions that govern them."[191] In short, they are defects in the republican form of government, which the Fourteenth Amendment was enacted to correct.[192]

Finally, it is important to address the notion that the Framers' meaning of equal protection meant only a prohibition on class discrimination. Actually, the Framers

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would not have perceived the Fourteenth Amendment's task achieved simply because the persistence of inequality was a product of blacks' inability to obtain gainful work, not because whites hated them, but because whites believed they were not intelligent enough to perform the work.

[186] 59 Mass. (5 Cush.) 198, 206 (1849) (emphasis added).

[187] *Id.* at 206.

[188] Brest, *supra* note 110, at 7.

[189] *Id.* at 6.

[190] *Id.* at 7–8.

[191] ELY, *supra* note 123, at 82 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977)).

[192] *Id.* at 135–79.

intended to do much more.[193] The language of discrimination was directly rejected during the framing of the amendment because such a narrow meaning and application would not encompass the broader ethical principle that was the driving force behind the amendment.[194] More specifically, equal protection is an affirmative guarantee, whereas discrimination is often conceptualized as a negative right.[195] The right to be free from discrimination under the Supreme Court's precedent has only protected minorities when some action has been taken against them or some conscious consideration of race has occurred.[196] Thus, it has primarily protected minorities in reaction to specified acts of others, whereas equal protection affirmatively demands that one not be denied of some privilege, consideration, or benefit. Whether action or inaction, ignorance or knowledge, or like or dislike caused the deprivation is irrelevant.[197] The individual has the same right to the government's protection or bounties as any other similarly-situated citizen. Thus, understanding affirmative equal protection primarily in terms of negative discrimination inherently constrains rather than reflects the purpose of the amendment.

The meaning of discrimination is relative to individual's morals, bias, and culture. That is not to say equal protection does not suffer from some of the same problems, but equal protection is not an individual or a moral question. Equal protection questions whether the process by which the government treats its citizens comports with our form of government and with the law and values therein. Although it often includes a prohibition of immoral or unethical activity, its guarantee does not rest upon a showing of such activity. Instead, it rests upon the guarantee that the government will not deal with its citizens unequally, unreasonably, and unfairly. If it has dealt with its citizens unequally, acting with the greatest of intentions is no defense.

At its most basic level, equal protection, unlike discrimination, derives from the founding document of our nation, the Declaration of Independence, and its "self evident

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[193] *See, e.g.*, FAIRMAN, *supra* note 58, at 1280–81, 1283, 1288 (discussing the desire to prohibit class legislation, but also the desire to protect citizens from state abuses and unconstitutional acts, to protect loyal white men, and to protect life, liberty, and property); Kaczorowski, *supra* note 102, at 388.

[194] FAIRMAN, *supra* note 58, at 1291 n.272 (detailing Sen. Howard's fruitless attempts to have language regarding discrimination inserted in lieu of Sen. Bingham's broader language); *id.* at 1284 (quoting Stevens's proposed amendment to bar racial "discrimination"); FONER, *supra* note 114, at 257 (contrasting the effort to provide a taxonomy of rights and prohibitions in the Civil Rights Act against the broad language of the Fourteenth Amendment).

[195] *See generally* GRAHAM, *supra* note 104, at 314–36; Kaczorowski, *supra* note 102, at 388–89 (discussing the affirmative duties the amendment placed on the states).

[196] *See supra* notes 15–47 and accompanying text.

[197] *See, e.g.*, GRAHAM, *supra* note 104, at 314–16; Frank & Munro, *supra* note 103, at 470 ("A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action." (quoting Sen. Frelinghuysen)); Kaczorowski, *supra* note 102, at 370 (the amendment was designed to give the Court the power to confront civil rights issues, whether the results of action or inaction).

truthes—All men are created equal."[198] Of course, this self evident truth did not generate any legally cognizable rights because although all men may be created equal, the government had not been bound to recognize this maxim. Equal protection, conversely, does bind the government to realize the maxim through its relations to citizens. Thus, the government must not only accept the proposition of equality, it must affirmatively afford an equal worth and protection to all its citizens. In fact, this affirmative equal protection gave opponents of ratification some pause because they feared that it would create an affirmative demand for substantive rights and resources.[199]

IV. THE INTENT STANDARD'S INABILITY TO MATCH EQUAL PROTECTION'S MEANING

The Supreme Court's measure of racial equal protection is the intent standard. The intent standard, however, is entirely inconsistent with equal protection's meaning, purpose, and modern factual realities. The failure to ever arrive at consistency may be completely lost upon the Court, since its forays into the meaning and purpose of equal protection have been rare at best. Moreover, when the application of equal protection began to increase in the last century, and hence its meaning was most important, the Court charted its own vision of equal protection through the intent standard, which the following will show is beset by problems at every turn. Rather than return to the source for guidance, the courts have inserted their own meanings and values into equal protection. Consequently, racial equal protection reflects the men and women who interpret it rather than any inherent principle or purpose in the Fourteenth Amendment, the Constitution, or antidiscrimination.[200]

A. Inconsistency with Other Constitutional Torts and Antidiscrimination Paradigms

The intent standard first began to go astray when the Court removed racial equal protection from the backdrop of other constitutional torts and the predominant legal understanding of intent. When the Court first introduced the intent standard in race, the courts of appeals—and even the Supreme Court in a limited respect—sought to apply it consistently with other civil rights paradigms and particularly with other constitutional torts. Race discrimination and equal protection are but two of several

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[198] GRAHAM, *supra* note 104, at 5–6, 236–37.

[199] NELSON, *supra* note 104, at 114–21 (providing an overview of federalist objections to the amendment and the responses).

[200] *See, e.g., id.* (observing that Court opinions regarding the Fourteenth Amendment "reflect" Court members' personal views rather than the Constitution).

civil rights or constitutional torts[201] that are actionable under 42 U.S.C. § 1983[202] and that had similar or identical *mens rea* requirements at one point.[203]

In *Monroe v. Pape*,[204] the Court concluded that proof of intent for constitutional torts "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[205] Racial equal protection, likewise, initially adhered to this backdrop, but when the Supreme Court in *Keyes v. School District No. 1* distinguished between de facto and de jure segregation, it heightened and differentiated the intent standard for race discrimination.[206] The clear inconsistency of such a distinction, however, led the lower courts to conclude that *Keyes* was addressing a narrower question and should not be read to have radically changed race discrimination law in contrast to other constitutional torts. After *Keyes*, courts continued to find that "intent" could be shown with evidence short of animus or a specific racial purpose.[207] The awareness that one's actions would cause a disparate impact or racial harm was sufficient. In short, even after the Supreme Court established the race discrimination intent doctrine, lower courts found intent could be inferred "based

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[201] Including deprivations of life, liberty, and property; infringement of free speech; and cruel and unusual punishment.

[202] 42 U.S.C. § 1983 creates a cause of action for deprivation of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). As for Constitutional torts, this includes violations of specific provisions of the Bill of Rights, other substantive guarantees such as equal protection, and violations of procedural and substantive Due Process. *See, e.g.*, Barnier v. Szentmiklosi, 565 F. Supp. 869 (E.D. Mich. 1983) (discussing classes of causes of action under 42 U.S.C. § 1983).

[203] *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (recognizing the application of deliberate indifference in due process); Whitley v. Albers, 475 U.S. 312, 320 (1986) (affirming Estelle v. Gamble, 429 U.S. 97 (1976)); Daniels v. Williams, 474 U.S. 327, 335–36 (1986) (backdrop of negligence applies to due process); Parratt v. Taylor, 451 U.S. 527, 534 (1981) (section 1983 is not limited to intentional deprivations); *Estelle*, 429 U.S. at 106 (deliberate indifference generally applies to Eighth Amendment claims). Unlike in race discrimination, other constitutional torts draw upon each other in fashioning state of mind requirements. *See generally Sacramento*, 523 U.S. 833.

[204] 365 U.S. 167 (1961).

[205] *Id.* at 187.

[206] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973).

[207] *See, e.g.*, United States v. Sch. Dist. of Omaha, 521 F.2d 530, 536 (8th Cir. 1975) (overturning a district court that had failed to presume intent based on the "natural, probable and foreseeable consequences" of the defendant's actions), *cert. denied*, 423 U.S. 946 (1975); Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) (using natural and foreseeable consequences to establish intent); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974) ("[A] pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions."), *cert. denied*, 421 U.S. 963 (1975); Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974) ("A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation."), *cert. denied*, 421 U.S. 963 (1975).

on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing [racial inequality]."[208]

The failure to recognize a significant distinction, moreover, was not merely an oversight or lack of analysis. For instance, the Second Circuit in *Hart v. Community School Board of Education*[209] bluntly dismissed the notion that *Keyes* had distinguished

> between intentional acts of school authorities reasonably foreseeable as effecting segregation but without specific racial motive, and acts discriminatingly racial in motive. . . . We do not think the Supreme Court has said that intent may not be established by proof of the foreseeable effect on the segregation picture of willful acts.[210]

Thus, the courts found the more "orthodox" test to be the objective test applied to other constitutional torts.[211] They persisted in this view even after the Supreme Court decisions in *Washington v. Davis*[212] and *Arlington Heights v. Metropolitan Housing Authority*[213] held that disparate impact alone did not establish intent or an equal protection claim. While interpreting those decisions, the Seventh Circuit wrote, "[a]s a subjective test would be impossible to apply . . . , the courts are driven to adopt an objective criterion" to determine intent.[214] The lower courts' only conceptualization of the Court's intent standard was that they must infer an intent to discriminate from "the natural and foreseeable consequences of [the defendant's] action or inaction."[215]

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[208] *Hart*, 512 F.2d at 50.

[209] 512 F.2d 37.

[210] *Id.* at 49–50.

[211] United States v. Bd. of Sch. Comm'rs of Indianapolis, 573 F.2d 400, 413 (7th Cir. 1978); *Hart*, 512 F.3d at 50–51.

[212] 426 U.S. 229 (1976).

[213] 429 U.S. 252 (1977).

[214] *Indianapolis*, 573 F.2d at 413; *see also Hart*, 512 F.2d at 50. The Second Circuit wrote, "To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions." *Id.* Similarly, the Sixth Circuit wrote:

> [I]t would be difficult, and nigh impossible, for a district court to find a [defendant] guilty of [intentional discrimination], unless the court is free to draw an inference of [discriminatory] intent or purpose from a pattern of official action or inaction which has the natural, probable and foreseeable result of increasing or perpetuating [a racially disparate impact].

NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047–48 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977).

[215] *Indianapolis*, 573 F.2d at 413; *see also* United States v. Tex. Educ. Agency, 579 F.2d 910, 913 (5th Cir. 1978) (overturning the district court's decision based on its reading of *Washington v. Davis* and *Arlington Heights* because "[n]either of those decisions abrogated the principle that an actor is held to intend the reasonably foreseeable results of his actions"), *cert denied*,

Consequently, the Supreme Court had to take up the issue again in *Columbus Bd. of Educ. v. Penick*[216] and *Dayton Bd. of Educ. v. Brinkman*.[217] In those cases, even the Court struggled to reconcile its own doctrine with factual and evidentiary realities. In both cases, it explicitly wrote that intent cannot be inferred from natural and foreseeable consequences alone,[218] but it nonetheless found it could not "fault" the lower courts when they drew "the inference of segregative intent from the . . . defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance."[219]

Although these cases suggest an ambivalence toward a stringent intent standard, subsequent decisions by the Court did not. They made clear that equal protection and racial discrimination claims are not read against the background of tort liability described in *Monroe*.[220] Rather a plaintiff must show that the defendant's subjective intent included a racial motivation.[221] Unfortunately, as a result, the Court not only created an inconsistency with other constitutional torts, its subjective intent standard created an application problem.[222] As the foremost tort treatise indicates, "the trier of fact has no mind reading machine to determine . . . subjective intent. One's subjective intent is necessarily determined from external or objective evidence."[223]

The meaning of racially discriminatory intent has likewise become inconsistent with other antidiscrimination paradigms, even those that require intent. In comparison to other paradigms, the Court's application of intent appears aberrational and designed to erect barriers for plaintiffs rather than remove them or foster equality. The intent

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443 U.S. 915 (1979); United States v. Sch. Dist. of Omaha, 565 F.2d 127, 128 (8th Cir. 1977) ("We have again examined our holding of intentional segregation in the light of *Arlington Heights v. Metropolitan Housing Development Corp.*, and conclude that the evidence is clear that a discriminatory purpose has been a motivating factor in the School District's actions because the natural and foreseeable consequence of the acts of the School District was to create and maintain segregation in five different areas, which evidence was not effectively rebutted by the School District." (internal citations omitted)), *cert. denied*, 434 U.S. 1064 (1978).

[216] 443 U.S. 449 (1979).

[217] 443 U.S. 526 (1979).

[218] *Columbus*, 443 U.S. at 464; *Dayton*, 443 U.S. at 536 n.9.

[219] *Columbus*, 443 U.S. at 463–64 & n.12 (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 240 (S.D. Ohio 1977)); *Dayton*, 443 U.S. at 529–30, 535–37, 539–41.

[220] Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978).

[221] Per. Admstr. Mass. v. Feeney, 442 U.S. 256 (1979).

[222] *See, e.g.*, United States v. Bd. of Sch. Comm'rs of Indianapolis, 573 F.2d 400, 413 (7th Cir. 1978) (pointing out the subjective standard was "impossible" to apply); Green, *supra* note 57, at 112–26 (analyzing the limitations of and problems with courts' search for subjective, conscious intent to establish the existence of employment discrimination).

[223] DAN B. DOBBS, THE LAW OF TORTS 49 (2000). Dobbs notes that "bad motive is occasionally important in determining tort liability . . . . But the concept of intent is not the same as the concept of motive." *Id.*

standard in race is uniquely narrow, cutting off remedies where they would otherwise be available in other paradigms. Other antidiscrimination paradigms have conceptualized intent in broader terms, which consequently places the government on notice that it must consider the consequences of its actions and the potential burdens or denials of benefits that they visit on citizens.[224] In this respect, other paradigms have used a version of intent that could take into account some of the central concerns of equal protection, but as demonstrated below, the Court has moved racial intent in an entirely different direction.

Comparing discriminatory intent in race to disability provides a vivid example. In disability, plaintiffs must still establish "intentional" discrimination, but intent includes actions that lack any invidious or inappropriate motivation and that also may be less deliberate. Squarely addressing the issue of "determin[ing] the appropriate test for intentional discrimination,"[225] courts indicate "intentional discrimination against the disabled does not require personal animosity or ill will. Rather, intentional discrimination may be inferred when a 'policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result . . . .'"[226] In this context, deliberate indifference is tantamount to realizing the harm that your actions will create but taking such action nonetheless. In essence, the courts are looking for the cause of inequality under the law. If that inequality is a result of conscious choices, courts will often impose liability.[227] Moreover, it is worth noting that if a plaintiff is not seeking monetary damages, he need not even show intent, because the focus is on eliminating inequality and barriers.[228]

In contrast to racial discrimination, disability discrimination considers whether the purpose of the defendant's actions is or may be to achieve some result other than harming the disabled, but the courts conclude it is intentional discrimination nonetheless because the defendant was aware the harm or denial would occur and either could have avoided it or was willing to accept it. Conversely, in racial discrimination, courts treat the harm as a natural byproduct of operating a business, school, or institution, and the entity has no responsibility to consider or avoid such results. Hence, courts look for a racial purpose, ill will, or animosity in race discrimination before confronting

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[224] *See infra* notes 225–26 and accompanying text; *see supra* notes 15–20 and accompanying text.

[225] Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001).

[226] Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998) (internal citations omitted) (quoting Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996)); *see, e.g.*, *Duvall*, 260 F.3d at 1138; Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999).

[227] *See, e.g.*, *Bartlett*, 156 F.3d at 331; Bravin v. Mount Sinai Med. Ctr., 58 F. Supp. 2d 269, 273 (S.D.N.Y. 1999) (quoting Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1147 (S.D.N.Y. 1997)).

[228] Alexander v. Choate, 469 U.S. 287, 292–302 (1985); *Bartlett*, 156 F.3d at 331; Tyler v. City of Manhattan, 118 F.3d 1400, 1406 n.4, 1414–15 (10th Cir. 1997); M.P. v. Indep. Sch. Dis. No. 721, 200 F. Supp. 2d 1036, 1040 (D. Minn. 2002).

the harm, while the courts in disability law need identify no such analogous purpose.[229] The Court has never justified its use of a different standard in cases regarding race discrimination or how a higher intent standard serves the end of equality in race but not elsewhere.[230] In short, the intent standard in race stands as an island against an ocean of reasoning that has found that antidiscrimination and constitutional rights should be protected with a more accessible and objective standard.

B. Focusing on the Wrong Issue

As the previous section suggests, the Court has driven racial intent into a corner through its preoccupation with, and objections toward, disparate impact and natural and foreseeable consequences. In the process, the Court strayed from the Framers' meaning by making the wrong inquiries and distinctions. Intent's paradigmatic focus is on discrimination rather than equality, which skews its inquiry away from whether a racial minority member has been given the fair consideration and protection of his government to whether the government has implemented some design to harm him. In fairness, the intent standard could theoretically incorporate some of equal protection's central concerns with consideration, valuation, and protection, but the Court's incessant focus on animosity-driven discrimination overshadows all other inquiries and realistic distinctions.

Since *Washington v. Davis*, the Court has fostered a dichotomy between intent and disparate impact, premised on the notion that disparate impact is not discrimination and, thus, tolerable under equal protection.[231] This conclusion regarding disparate impact does not necessarily follow from a prohibition on discrimination or guarantee of equal protection.[232] For example, whether a harm is perpetrated by malicious motivations, benign neglect, indifference, or pure ignorance does not change the harm.[233] The failure to prevent the harm, regardless of motivation, could be characterized as

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[229] *Compare supra* notes 15–20 and accompanying text regarding racial intentional discrimination requirements, *with supra* notes 220–23 regarding intent in disability.

[230] This difference is rather quixotic considering the ADA was modeled after Title VI's prohibition on racial discrimination, with the only relevant explicit difference being the group which they seek to protect from discrimination. *Compare* Americans with Disabilities Act, 42 U.S.C. § 12132 (2000), *with* Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

[231] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 281 (2001); Washington v. Davis, 426 U.S. 229, 239–45 (1976).

[232] *See, e.g.*, Green, *supra* note 57, at 143 (arguing, in regard to the distinction between discrimination and disparate impact in employment discrimination, that "[i]t is neither realistic nor sensible, however, to combat the operation of discriminatory bias in the modern workplace along such dichotomous lines").

[233] TRIBE, *supra* note 8, at 1507; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

a failure to provide equal protection under the law.[234] The Court, however, has not explained why disparate impact or benign neglect, for instance, cannot demonstrate discrimination or a denial of equal protection while some other category of facts can. Such an explanation is particularly important when such evidence demonstrates discrimination in other paradigms and also did so in race cases prior to *Keyes*.[235] The most the Court has explained is that, because disparate impact does not necessarily implicate intentional race discrimination, it alone does not amount to prohibited discrimination.[236] Thus, the Court's overriding principle is that discrimination means a prohibition only on "intentional" discrimination. Likewise, equal protection is not denied so long as no one acts with the design to produce racial disadvantage.

The Court's division between impact and intent assumes a larger gap between the two than actually exists and, thus, is disconnected from reality.[237] A sharp line between impact and intent cannot be drawn without excluding a host of decisions that otherwise constitute intent. The impacts that a decision will have are not merely incidental byproducts that are disconnected from the decision-making process but rather are inherently and volitionally connected to the decisions. For instance, legislative bodies' decisions are deliberate, calculated, and rarely lack a specific awareness and valuation of the results.[238] The Court, however, has been insistent that awareness alone does not amount to "intent,"[239] but the failure to incorporate the inherent significance of this awareness into its analysis falsely assumes that one can be both aware of a racial harm and either assign no value or make no judgment toward it.

Rather than conclude its inquiry, the Court should ask deeper questions. For instance, when a facially neutral criterion knowingly excludes minorities disproportionately and alternatives are available, but the criterion is employed simply because

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[234] TRIBE, *supra* note 8, at 1507.

[235] Alexander v. Choate, 469 U.S. 287, 292–302 (1985); Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).

[236] *Sandoval*, 532 U.S. at 275; Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *Davis*, 426 U.S. at 230.

[237] *See, e.g.*, Green, *supra* note 57, at 143 (finding the Court's distinction in employment discrimination to be unrealistic).

[238] ELY, *supra* note 123, at 135–70. At the heart of our democratic system are the trust and responsibility that our representatives are making rational and informed decisions that treat all our citizens fairly. The democratic process inherently entails constant decision-making whereby outcomes are achieved by weighing costs and benefits. Moreover, in terms of race, the decision-makers should not have the luxury of weighing costs and benefits in a manner that is advantageous to only a portion of society or that miscalculates the gravitas of the burden on a particular group, due to his latent biases or indifference. Conscious or otherwise, such a decision is an irrational one that treats races unequally. The Fourteenth Amendment is directly aimed at ensuring that costs and benefits are weighed properly, particularly in regard to race. *Id.* Otherwise, a "process defect" occurs. *See* Lawrence, *supra* note 178, at 344–49.

[239] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 450 (1979); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 257–58 (1979).

of administrative ease, what does the valuation of efficiency over racial harm mean? Or would the same decision have been made if whites were the ones who were burdened?[240] In essence, driving a wedge between intent and impact results in a failure to ask what value or consideration one gives to a racial harm. Thus, it is a failure to address equal protection's central concern that the government affords these citizens the affirmative paternal consideration and protection it would afford any other citizen.

Regardless of how the Court focuses its intent standard, however, it will fall victim to problems of proof and the courts' own adjudicatory limitations. First, proving intent requires the nearly impossible task of demonstrating what the defendant was thinking or how the defendant would have acted had the affected group been of a different race.[241] Ultimately, the intent standard asks courts to speculate,[242] but the courts have been unwilling to infer discrimination.[243] If anything, the courts are prone to make assumptions to the detriment of plaintiffs because of their own subjective normative judgments.[244] Second, courts today are often limited in their ability to recognize or infer discrimination. Their frame of reference is based upon their prior adjudicatory experience with discrimination, which during the past century was predominated by overt acts of racial hatred or intolerance.[245] Discrimination has simply changed since then. Moreover, inferring more subtle discrimination requires that one perceive racial inequality as aberrational.[246] However, since such inequality is so prevalent, it appears natural rather than aberrational or problematic to most individuals. Unfortunately, judges may be the least able of any to recognize racial inequality as aberrational because they come from extremely privileged backgrounds that "restrict [their] view" and require minority plaintiffs to paint "more vivid and complete pictures [to allow

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[240] For a discussion of how such an inquiry would proceed, see Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 291–94 (1997).

[241] *See, e.g.*, NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047–48 (6th Cir. 1977) (finding the stricter intent standard to be almost impossible to meet, short of admissions by the defendant), *cert. denied*, 434 U.S. 997 (1977); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 965 (1989); *see also* Selmi, *supra* note 240, at 293 (finding in some intent cases the "standard of proof probably cannot be met").

[242] Strauss, *supra* note 241, at 953–68 (arguing the test is inherently speculative).

[243] Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (detailing empirical findings that show a pattern of failing to infer discrimination).

[244] *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100, 136–55 (1981) (Marshall, J., dissenting); Freeman, *supra* note 233; Selmi, *supra* note 240, at 281–86.

[245] TRIBE, *supra* note 8, at 1509 (indicating that in *Washington v. Davis* and cases thereafter, the Court looked for a "bigoted decision-maker" as a scapegoat to provide the Court's rationale for finding no equal protection violation); Selmi, *supra* note 240, at 335 (discussing the Court's difficulty in shifting from a segregation mentality).

[246] Selmi, *supra* note 240, at 280–83.

judges] to understand the problems sufficiently."[247] In short, plaintiffs cannot merely persuade by a preponderance of evidence; rather, they face the uphill battle of making courts "believe" in spite of their own experience.[248]

C. Capitulating to Rather Than Challenging the Status Quo

The intent standard also contradicts equal protection's core promise to serve as an agent of change and a check on the powers of the status quo, government, and abuses by the majority. As discussed earlier, the Framers sought not to solidify the status quo, or inequality, but to provide a mechanism to change social structures, the relationship of citizen to government, and racial inequity.[249] The Court's interpretation and application of the intent standard is diametrically opposed to such ends. In effect, it solidifies the status quo.

The intent standard favors the status quo by disconnecting today's racial inequalities from the law's ability to challenge them. In nearly every sphere, racial minorities are disadvantaged or lag behind whites, so much so that they live in essentially two different worlds.[250] The creation and continuation of these racial differences in areas such as education, housing, and transportation are not happenstance, but are the result of decisions that institutions and individuals make on a regular basis.[251] Each year we have a choice of how to assess taxes, allocate resources, engage in new construction, and each of these decisions either maintains or diverges from the status quo of racial inequity. Thus, racial inequity does not continue unaided through time, but is dependent on active decisions and policies.[252] Moreover, decisions to reinforce the status quo are an active continuation of past discrimination, which our law and country has never significantly remedied.[253] Today's status quo of racial inequity

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[247] Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 771 (1995); *see also* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 143–46, 256–61 (3d ed. 1994) (federal judges come from a super-elite status that affects outcomes).

[248] *See, e.g.*, Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 280 (5th Cir. 1999) (admitting a reluctance to infer discrimination except when "disparities [in qualifications] are so apparent as virtually to jump off the page and slap [the judge] in the face"); Green, *supra* note 57, at 118 (discussing hesitance to infer discrimination).

[249] *See* FONER, *supra* note 114, at 257–58 (noting that the Fourteenth Amendment's purpose was to "permanently alter[] American nationality" and "broaden[] the meaning of freedom").

[250] *See generally* ADALBERTO AGUIRRE, JR., RACIAL AND ETHNIC DIVERSITY IN AMERICA 27–38, 42 (2003); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[251] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXLUSION, AND AMERICAN LAW 70–74 (1990) (concluding that the status quo is not natural, uncoerced, or good).

[252] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973) (discussing the various options school boards have and their relationship to continued segregation).

[253] *See, e.g.*, FONER, *supra* note 114, at 70–71, 104–07 (referencing the failed promise of reparations).

is directly connected to yesterday's,[254] and it extends back to the very status quo that equal protection was intended to challenge.[255]

The intent standard, however, masks and protects these decisions to perpetuate the racial status quo. Regardless of the harm or injustice of these decisions, the intent standard treats them as neutral if they cannot be connected to an overt racial consideration.[256] Thus, the intent standard transforms equal protection law from a challenge to the status quo to a defense for it. Moreover, in the absence of explicit evidence of racial consideration, the intent standard leaves the disadvantaged completely subject to the democratic process and the will of the status quo, even though the Framers sought to check the majority's ability to visit impositions on the minority.[257]

School desegregation is a vivid example of how the Court has used the intent standard and its iterations to protect the status quo and perpetuate racial disadvantage. Once desegregation expanded beyond the South and began to demand structural change, it seriously challenged whites' individual autonomy, the rules by which public schools order themselves, housing patterns, and demographic shifts.[258] These issues came to the fore in *Keyes v. School District No. 1*[259] and threatened to create a national restructuring process and undermine the status quo.[260] Although previously drawing no distinction between de jure and de facto segregation,[261] the Court held that the Constitution only prohibits purposefully or intentionally segregative policies and, thus, only de jure segregation.[262] In the process, the Court ushered in solid protection for

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[254] *See, e.g.*, *Keyes*, 413 U.S. at 208–09 (recognizing the connections to the past and that passage of time does not make segregation any less "intentional[]"); Green v. County Sch. Bd. of New Kent, 391 U.S. 430, 438 (1968) (because segregation perpetuates itself through time, schools must eliminate the vestiges of discrimination by "root and branch").

[255] *See supra* pp. 555–56.

[256] MINOW, *supra* note 251, at 77–78 (discussing the failure of the law to limit the perpetuation of the status quo); Freeman, *supra* note 233, at 1052–57 (discussing the Supreme Court's perpetrator perspective which treats the condition of inequality as fair).

[257] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[258] Freeman, *supra* note 233, at 1109–14.

[259] 413 U.S. 189 (1973).

[260] *Keyes*, 413 U.S. at 218–19 (equalization had begun in the South, but "[n]o comparable progress ha[d] been made in many nonsouthern cities . . . because of the *de facto/de jure* distinction nurtured by the courts"); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 260–68 (1979) (*Keyes* "was about to become the *Brown* case for the rest of the country outside the South" and open the door to desegregation "in every major city in America" (italics added)).

[261] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).

[262] *Keyes*, 413 U.S. at 208–09.

the current structure of schools and identified clear limits to desegregation.[263] Moreover, the Court in *Keyes* refused to even ask the status quo of segregation to justify itself, as previous Courts had done, and left enormous amounts of segregation unchecked.[264] Even the generally conservative Justice Powell chided the Court for a divergence from precedent,[265] an abandonment of equal protection for blacks,[266] and blindness to the historical connection between segregation and state action.[267]

The Court continued this entrenchment of the status quo in cases like *Milliken v. Bradley*.[268] Even where local, state, and federal actors intentionally created de jure segregated schools and only a comprehensive metropolitan plan could remedy them,[269] the Court denied relief because of the high costs to the status quo in "the structure of public education,"[270] public opposition to "forced integration,"[271] and what the Court found to be "innocent" whites in the suburbs. Here, the Court disregarded the violation, harm, and need for a remedy[272] and, ultimately, left the constitutional harm undisturbed.[273] In effect, the Court created a legal wall between cities and suburbs, over which no desegregation will travel.[274] As both this case and *Keyes* demonstrate, the Court has used and manipulated the intent standard to protect the status quo, rather than challenge it as equal protection was intended to do.

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[263] WOODWARD & ARMSTRONG, *supra* note 260, at 260–68 (describing the internal resistance on the Court to any decision that would provide sweeping remedies or widespread desegregation in the North).

[264] Freeman, *supra* note 233, at 1107–14 (discussing the cases following *Keyes* that relied upon it in finding the current segregation constitutional).

[265] *Keyes*, 413 U.S. at 231 (Powell, J., concurring in part and dissenting in part) ("[T]he 'differentiating factor' between *de jure* and *de facto* segregation [is] 'purpose or intent' [and] is difficult to reconcile with . . . *Wright v. Council of City of Emporia* . . . . [*Wright* held] 'motivation of school authorities is as irrelevant as it is fruitless. . . . [W]e have focused upon the effect—not the purpose or motivation . . . .'" (internal citations omitted)).

[266] *Id.* at 219–21 (finding that the majority had abandoned its concern for those who suffered from segregation and through the "perpetuat[ion of an unrealistic] legalism").

[267] *Id.* at 227, 228 n.12 ("[I]t is probable that all racial segregation . . . has at some time been supported or maintained by government action.").

[268] 418 U.S. 717 (1974).

[269] *Id.* at 738 n.18; Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *rev'd*, 418 U.S. 717 (1974).

[270] *Milliken*, 418 U.S. at 742–43; *see also* WOODWARD & ARMSTRONG, *supra* note 260, at 283 (Burger believed "it was unfair to punish [the suburbs] by involving them in any city-suburban desegregation scheme").

[271] WOODWARD & ARMSTRONG, *supra* note 260, at 267.

[272] *Milliken*, 418 U.S. at 741–44 (finding the cost of altering the educational structure, consolidation, transportation and financing to be too high of a burden).

[273] *Id.* at 763 (White, J., dissenting) ("[D]eliberate acts of segregation and their consequences will go unremedied . . . because an effective remedy would cause . . . undue administrative inconvenience to the State.").

[274] *Id.* at 768 ("[R]emedies . . . must stop at the school district line. . . . [N]o matter how [superior] . . . the metropolitan plan might be . . . .").

V. A STANDARD TO MATCH THE MEANING: DELIBERATE INDIFFERENCE

As the above demonstrates, the intent standard does not reflect the Framers' understanding or a fair meaning of equal protection, nor has it proved manageable. In its place, this Article proposes a deliberate indifference standard. Since equal protection is an idea, proscribing a standard that perfectly carries out its meaning is inherently daunting, if possible.[275] Thus, this Article does not argue that deliberate indifference is an exact measure of racial equal protection, but rather a measure that does substantial justice to equal protection and comes closest to achieving its ends. As the following will show, a deliberate indifference standard overcomes the problems of proof that limit the intent standard. In doing so, a deliberate indifference standard reflects and ensures equal protection's concern that all receive the paternal consideration and protection of their government.

Although titled the same, this Article does not advocate the same deliberate indifference standard as used in other civil rights paradigms.[276] A deliberate indifference standard in racial equal protection would similarly focus on whether the government is actively cognizant of its citizens' rights and the harm it causes them, but this standard would be an objective one with four prongs: first, whether the government was or should have been aware of the racial harm or impacts that its actions caused or the benefits/opportunities it denied; second, whether other less harmful reasonable alternatives were or became available; third, why those alternatives were not implemented; and fourth, what, if any, interests are used to justify the racial harm. The inquiry moves to the third and fourth prongs only if the answers to the first two are affirmative. Under the final prongs, if the defendant cannot justify the choice to perpetrate a racial harm—in spite of available alternatives—with some governmental purpose that outweighs the racial harm, then the deliberate indifference standard would find that equal protection had been denied.[277]

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[275] NELSON, *supra* note 104, at 7 (finding that the Framers' understanding of equal protection existed on a conceptual, rather than doctrinal, level).

[276] *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (applying deliberate indifference to sexual harassment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (recognizing the application of deliberate indifference in due process claims); Whitley v. Albers, 475 U.S. 312, 320 (1986) (generally requiring a deliberate indifference standard in Eighth Amendment claims); Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) (applying deliberate indifference in disability).

[277] Determining what would outweigh the racial harm can sometimes be a difficult issue, but one with which the Court has had significant experience that it could turn to for guidance, such as balancing tests in employment discrimination and Title VI cases or requiring compelling and important interests to justify affirmative action programs. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (requiring compelling interest); United States v. Virginia, 518 U.S. 515 (1996) (requiring important interest); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (weighing the burden of alternatives); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (requiring a business necessity to outweigh disparate impact), *superseded*

This deliberate indifference standard is not a radical departure from precedent. Its state of mind requirement is a middle ground between the current intent standard and its precursors. First, deliberate indifference bears some semblance to the natural and foreseeable consequences standard in that it begins with an assessment of reasonably known harms, but it has notable differences. The state of mind requirement in the foreseeable consequences standard is similar to that of common law intentional torts, where one intends a result if there is a substantial certainty that it will result from one's action.[278] Essentially, this creates per se liability for foreseeable disparate impacts. A deliberate indifference standard does not assume that because a disparate impact occurs the defendant intended or desired it. Instead, its only premise is that even a government that affords only the most basic protection or consideration to its citizens would not create known racial harms when it has available alternatives or when no legitimate interest requires its action.

Second, the intent standard focuses on the subjective motive behind the harm rather than the harm itself.[279] Like the current intent standard, deliberate indifference would not find liability solely based on disparate impact, but it would make intent an objective inquiry by finding the government has not provided equal value to a group when its consideration falls below a certain level. In short, deliberate indifference's state of mind requirement is higher than foreseeable consequences yet lower than the current intent standard.[280]

In addition to being reasonably situated within precedent, deliberate indifference focuses squarely on some of the Court's current substantive concerns in equal protection. For instance, deliberate indifference's concerns with minimizing harm and weighing interests have been an important inquiry in the Court's affirmative action cases. There, the Court scrutinizes the impact on innocent third parties and requires that it be minimized through reasonable alternatives.[281] Moreover, even if the impact is minimal and there are no alternatives, the Court will only tolerate the impact when

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by statute, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1074; GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (requiring educational necessity to outweigh impact). The Court, likewise, balances private interests against governmental costs in due process. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

[278] DOBBS, *supra* note 223, at 47–48.

[279] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240, 246 (1976); Jefferson v. Hackney, 406 U.S. 535, 548 (1972) (refusing to scrutinize a policy simply because of its disparate impact; otherwise, all impacts would be rendered suspect no matter how "lacking in racial motivation and how[] . . . rational the treatment might be").

[280] *Compare* Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978), *with* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[281] *Grutter*, 539 U.S. at 324, 340–41; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978).

a compelling government interest outweighs and justifies it.[282] Thus, although slightly lowering the current state of mind requirement, the deliberate indifference standard does so with a focus on concerns similar to those consistently expressed by the Court.

A. Justifications for the Standard

A deliberate indifference standard is justified by its consistency with equal protection's meaning and our form of government. First, the Framers intended to secure affirmative rights through equal protection, not merely passive ones or the negative one of being free from discrimination.[283] By holding the government accountable for the harms and denials of benefits that it foresees and can avoid, deliberate indifference requires the government to be actively cognizant of the value and protection it affords its citizens. In doing so, it furthers an affirmative form of equal protection.

Second, equal protection entitles all to the "paternal consideration and protection of the law."[284] Deliberate indifference helps ensure they receive it by requiring that the government appraise itself of the harm its actions will cause, search out alternatives, and avoid the harm unless a significant interest requires the specific action. The government must actually consider and protect its citizens rather than ignore consequences and their comparative weight. This affirmative consideration does not inflate the value of minorities above others; it merely requires the government to afford minorities "the same sympathy and care" it gives to whites or the majority.[285]

Third, the Framers designed equal protection to challenge the status quo and make changes to the relationship between citizen and state.[286] Unlike the intent doctrine, deliberate indifference does not contain an inherent bias toward the status quo, nor does it allow the status quo to persist due to gaps in evidence.[287] A deliberate indifference standard forces the status quo to justify itself. Each time a decision is made to reinforce the status quo at the expense of racial harms, the standard requires an explanation of the alternatives to the decision and, if none are available, whether the reinforcement outweighs the harm it causes. Moreover, gaps in evidence as to the government's suspected motives would not prevent this inquiry.

Last, equal protection was intended to correct the defects in the political process and ensure that our republican form of government carries out its mandate.[288] A

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[282] *Grutter*, 539 U.S. at 326–29.

[283] *See supra* notes 163–65 and accompanying text.

[284] *See supra* notes 203–07 and accompanying text.

[285] Brest, *supra* note 110, at 7–8. For an explanation of why this affirmative consideration is justified and does not inflate the value afforded to minorities, see *infra* notes 328–38 and accompanying text.

[286] *See supra* notes 149–55 and accompanying text.

[287] Flagg, *supra* note 14, at 966 (describing the intent standard as a commitment to the status quo).

[288] ELY, *supra* note 123, at 135–79.

deliberate indifference standard furthers these ends by encouraging the government to engage in a deliberative process that considers available alternatives, relies on rational judgment, and renders decisions that account for and represent the whole of the citizenry. Thus, unlike the intent standard, deliberate indifference serves as a reliable check on the political process and increases its representativeness.

B. Application of the Standard

The ultimate test of a standard's accuracy and value is how it applies to real situations.[289] Applying deliberate indifference to *Alexander v. Sandoval*'s facts reveals that the test overcomes the intent standard's limitations, provides a viable remedy, and furthers equal protection's purpose without unfairly shifting the evidentiary balance in favor of plaintiffs. In *Sandoval*, Alabama amended its Constitution to declare English "the official language of the [s]tate."[290] The amendment also required that state officials take actions in furtherance of making English the common language of the state.[291] In response, the Alabama Department of Transportation (DOT) enacted policies that required all driver's license examinations to be administered in English and that no translators or dictionaries be permitted to assist non-English speakers.[292] Alabama was unique in this respect, as forty-eight other states (including those that had adopted English as their official language) had permitted their examinations to be administered in other languages.[293] Even Alabama, prior to the amendment, had permitted aids and administered the exam in other languages.[294] The local DOT offices often had done so at little or no cost, experienced no problems, and found that it created no public safety concerns.[295] Moreover, although the new policy prohibited accommodating non-English speakers, it allowed DOT to continue its practice of assisting, accommodating, and allowing aids for disabled and illiterate English-speaking applicants.[296] Thus, DOT singled out non-English speakers for this non-accommodating treatment,[297] causing many non-English speaking Latino and Asian-American residents to not attempt to obtain or actually receive the driver's licenses that are vital to their employment, education, and daily lives.[298]

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[289] For an additional application of deliberate indifference, see Almendares v. Palmer, 284 F. Supp. 2d 799, 807 n.5 (2003) (speculating as to how deliberate indifference might apply and stating "there would be no question that plaintiffs have stated a claim").

[290] Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1243 (M.D. Ala. 1998), *rev'd*, 532 U.S. 275 (2001).

[291] ALA. CONST. amend. 509.

[292] *Sandoval*, 7 F. Supp. 2d at 1243.

[293] *Id.* at 1284 n.52.

[294] *Id.* at 1284.

[295] *Id.*

[296] *Id.* at 1287.

[297] *Id.* at 1291.

[298] *Id.* at 1279 n.46, 1291–95.

Proving intent and obtaining relief under the Equal Protection Clause, however, would be difficult under these facts. In fact, the *Sandoval* plaintiffs did not even attempt to allege intent.[299] The first problem is that the amendment and policy on their face are racially and ethnically neutral. The basis for denial is the ability to read and speak English, which is a skill rather than an immutable characteristic. The plaintiffs would need to establish the connection between language and ethnicity to show that the defendant's motivation was in regard to ethnicity rather than simply language. In terms of impact, such a connection is easy to establish, but in terms of motivation the connection cannot be simply assumed, and here no evidence indicates such a motive.[300] Although the policy may be an unnecessary response to the amendment, this alone does not demonstrate a racial design or consideration. Likewise, some officials admitted that the policy was "dumb" and its other explanations lacked merit, but under intent, a meritless policy that produces racial harm can still be constitutional.[301]

A plaintiff might attempt to "reverse the groups" and argue that the defendant would not have been so draconian had the victims been predominantly white, but no facts are available as to how DOT would have acted.[302] The only available facts show a willingness to help disabled and illiterate individuals, but this is not an analogous case—even if it benefited many whites—because it involved English speakers and assisting them implicates neither the policy or amendment. Although treating any citizen in such a harsh manner might defy reason, without pertinent evidence, a court could only speculate as to how whites would have been treated, and they have proven unwilling to make the necessary inferences for plaintiffs.[303] Thus, notwithstanding the particular burden on Latinos and Asian-Americans, which most no one else experiences, the intent standard is paralyzed from helping them.

Deliberate indifference presents a very different analysis and outcome. The first question is whether DOT was or should have been aware of the harm. Having previously administered the test to non-English speakers, DOT knew that it would deprive vast numbers of Latinos and Asian-Americans a license.[304] The next issue is whether the harm could have been avoided. Here, it easily could have. Other states that recognize English as their official language have had no problem doing so.[305] Without affecting the state's official language, the test could be administered in English, while allowing applicants the use of a translator or dictionary, or it could simply be

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[299] *Id.* at 1278.

[300] *Id.* at 1281–82 (citing court decisions finding a nexus).

[301] *Id.* at 1286.

[302] *See generally* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (arguing that it always matters whose ox is being gored).

[303] *See generally* Eisenberg & Johnson, *supra* note 243 (detailing a systemic failure to infer discrimination).

[304] *Sandoval*, 7 F. Supp. 2d at 1283 n.50.

[305] *Id.* at 1299 n.78.

administered in another language. In fact, many officials in Alabama have employed these alternatives in spite of the policy.[306]

The third question is why DOT did not pursue these available alternatives. DOT's primary explanation is that it presumed such was necessary to comply with the amendment.[307] The amendment, however, neither explicitly nor implicitly mandated DOT's extreme action. It only required "steps necessary" to preserve and enhance "English as the common language of the state."[308] DOT made no showing that administering the examination solely in English or preventing accommodations was necessary to preserve or enhance English. Some evidence showed the policy had the opposite effect, as non-English speakers' ability to learn English decreased because without a license they were limited in opportunities and geographically isolated.[309] Moreover, several other states with analogous amendments found that accommodating non-English speakers was not a conflict.[310] In short, DOT over-interpreted the amendment and incorrectly rejected several better alternatives.

After the fact, DOT asserted that accommodations would compromise safety and the test's integrity.[311] The evidence shows such concerns are unfounded. First, Alabama's traffic signs use internationally recognized symbols, making language irrelevant.[312] Moreover, past experience had shown that safety was not jeopardized or affected by non-English-speaking drivers.[313] Likewise, cheating had been a relative non-issue in regard to accommodations and, even if it were, prophylactic measures were available to prevent the occurrence.[314] Thus, all of the asserted reasons why DOT did not implement an alternative are unfounded or flawed. Having shown known racial and ethnic harms, available alternatives, and disqualified reasons for not pursuing the alternatives, deliberate indifference would impose liability.

The first three inquiries demonstrate deliberate indifference is straightforward and can produce predictable results. Hence, the important issue is whether the above results reflect equal protection's meaning and purpose. Imposing liability after meeting the first three requirements might appear to overreach for the plaintiffs, if for no other reason than because of its apparent simplicity and ease. Imposing liability under these circumstances, however, comports with equal protection. One need only query why the government would persist in creating a racial harm when it had readily available alternatives and no reason to reject them.

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306 *Id.* at 1284 n.51.
307 *Id.* at 1298.
308 ALA. CONST. amend. 509.
309 *Sandoval*, 7 F. Supp. 2d at 1291–94.
310 *Id.* at 1299 n.78.
311 *Id.* at 1298.
312 *Id.* at 1300–02.
313 *Id.*
314 *Id.* at 1307–08, 1305.

Only four explanations are plausible. The government: (1) is incompetent or "dumb;" (2) harbors racial bias; (3) does not care about the harm it visits on ethnic minorities; or (4) is unwilling to put forth minimal effort to avoid the harm. If the reason is bias, liability is unquestionably justified.[315] Yet, the intent standard, as noted above, would fail to impose liability for lack of evidence. If the reason is that DOT does not care or does not care in comparison to the effort required to avoid the harm, either we paralyze equal protection by capitulating to inevitable evidentiary gaps as to comparative values, or we assume that a government acting in good faith would not unnecessarily harm citizens in this way or that those in power in the government would not treat members of their own ethnic group this way because it recognizes their value and humanity.

As discussed earlier, it is justified to assume a baseline of consideration that the government affords citizens.[316] Here, DOT easily falls below that baseline by imposing a significant harm for which it has no reason for not avoiding, particularly when alternatives are readily available. Thus, DOT would not have afforded the consideration or protection that it would to any other racial group.

Although unlikely, the last possibility is that the government is simply "dumb" or incompetent. Even the Supreme Court's most permissive equal protection standard requires that the government's actions be rationally related to its ends and would prohibit this.[317] Moreover, section one of the Fourteenth Amendment secured these rights in triplicate, including through due process, which would also preclude irrational decisions.[318] In short, deliberate indifference is manageable, simple to apply, and produces results that substantively comport with equal protection.

To move beyond the first three prongs to whether some governmental end outweighs the harm, this Article will assume that the alternatives to DOT's policy would have undermined a legitimate purpose. This also requires changing some facts and making some assumptions in DOT's favor: first, DOT cannot implement an alternative policy without incurring a cost; second, the policy is necessary to further the amendment; and third, accommodations would create safety concerns. Then, one must assess what is at stake for the plaintiffs. Here, the benefit is a significant one. A driver's license is a basic necessity of life and employment in Alabama.[319] Moreover, the Supreme Court has recognized that "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation,"[320] with lower courts adding that the right

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[315] *See supra* notes 186–88 and accompanying text.

[316] *See infra* notes 328–38 and accompanying text.

[317] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (requiring rationality to justify singling out a group); TRIBE, *supra* note 8, at 1440 (discussing equal protection's rationality requirement).

[318] Lingle v. Chevron, 544 U.S. 528, 542 (2005) (due process prohibits irrational government actions).

[319] *Sandoval*, 7 F. Supp. 2d at 1291.

[320] Delaware v. Prouse, 440 U.S. 648, 662 (1979).

to travel freely, "even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the nation's history.'"[321]

Such an important interest would most likely outweigh the state's interest in avoiding costs or furthering safety concerns. Based on the evidence, the financial and administrative cost of providing one or all of the accommodations discussed above would, at most, be a low one.[322] DOT's interest in avoiding a minor cost is simply insufficient to deny access to a life necessity that it affords to others.[323] The public safety interest seems similarly easy for the opposite reasons. If the policy cannot accommodate the plaintiffs without creating a significant public safety issue, the policy should stand. In such circumstances, the racial harm would not be something that DOT wants, tolerates, or is indifferent to, but rather is something that cannot be avoided. Regardless of what racial group is being harmed, there is no reason to believe the result would be different.

Weighing the constitutional interest is more difficult. Complying with a state law cannot justify violating federal law, but, of course, the deliberate indifference test only deems equal protection denied if the plaintiff's interest outweighs the state's.[324] If there were a legitimate need to declare an official state language (the language was in jeopardy or language differences created practical problems in the state's administration, economy, and education), such a constitutional interest should outweigh the racial harm. Again, the cause of the harm would not be a failure to protect or indifference toward a racial group but rather a sincere need to take some legitimate action that causes an unavoidable harm. Assuming the above, however, is assuming a great deal. In fact, the amendment itself may be motivated by reactionary sentiments toward the influx of immigrants, their increased political and economic relevance, or any other number of factors that relate to the majority disliking or seeking to disadvantage the minority. The evidence does not tell us whether the state interest is legitimate or reactionary, but if it were the latter, it would not outweigh the plaintiffs' interests.

As with the first three prongs, this one comports with equal protection's meaning and purpose. The question posed under this last prong ultimately goes to the heart of equal protection's concern that all be afforded equal valuation and protection. If they are, then harms would not be visited upon them unless some legitimate interest requires it. The above examples simply test the legitimacy and worth of these interests. When these interests are insignificant or only excuses for some other motive, the policy in question will be enjoined, for a government providing equal valuation and protection to its citizens would not create such racial and ethnic harms under such circumstances. Of course, a government might be affording significant value and protection to a

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[321] Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990).

[322] *Sandoval*, 7 F. Supp. 2d at 1303–06.

[323] The balancing test in due process cases requires the government to afford procedural due process notwithstanding the cost when significant private interests are implicated. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

[324] Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

racial minority and still carry forward in its action when harms are unavoidable in the pursuit of some legitimate and necessary government interest. Thus, equal protection is afforded notwithstanding the harm.

Although this balancing may appear to leave wide discretion to the courts, in many respects, it is no different than what has been occurring in racial equal protection for the past forty years.[325] The only difference here is that in the past the Court has been able to obfuscate the role of its personal values and balancing of interests (in protecting the status quo, for instance), whereas in deliberate indifference the weighing is transparent.[326] The transparency has the added value of being susceptible to facial critiques and also allowing the parties in a case to address and contest the interests rather than allowing a court free rein to do so implicitly.

In summary, a deliberate indifference standard succeeds where the intent standard consistently fails. In both theory and practice, it can fulfill the meaning and purpose of equal protection. Rather than granting defendants windfalls through evidentiary gaps, deliberate indifference provides a mechanism that makes them largely irrelevant. However, avoiding these problems is not done at the unfair expense of the government and only asks the basic level of good faith and respect towards its citizens that the Framers sought to protect. In only narrow circumstances will it require the courts to make "judgment" calls about the competing interests involved. Moreover, these decisions will not be unguided by precedent or the input of interested parties. In these respects, deliberate indifference is the best answer to the "idea of equal protection": providing relief to those who have been denied the value the government should afford to all citizens and always affords to some.

C. Objections to the Standard

Some might object that this standard could create an undue affirmative obligation on the government, prompting it to take stock of alternatives and results with which it otherwise would be unconcerned. Creating an affirmative obligation in equal protection, however, is exactly what the Framers sought to do.[327] Likewise, for a republican government to provide its citizens the paternal and equal consideration that equal protection requires, it cannot merely be passive or indifferent.[328] Thus, even if the standard did place an obligation on the government, it would only be one that is consistent with equal protection.

Another potential objection is that, in creating an affirmative obligation, the standard might provide more protection or consideration to minorities than to others as

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[325] *See supra* Part IV.

[326] For a discussion of the implicit role courts' biases play in discrimination cases and their favoritism toward the status quo, see *supra* notes 252–82 and accompanying text.

[327] *See supra* notes 193–99 and accompanying text, discussing equal protection as an affirmative right and distinct from the negative right of discrimination.

[328] GRAHAM, *supra* note 104, at 314–45; Frank & Munro, *supra* note 103, at 470.

a practical matter. For instance, if in a specific situation the government had been indifferent or given no consideration to the interests of the majority, the requirement of an affirmative consideration of the minority would actually be greater than that afforded the majority. In response, the paucity of evidence regarding subjective intent and valuation make it virtually impossible to know if this situation would often or ever be the case.[329] The same would be true regarding how often whites' interests are afforded inflated weight. Regardless of evidentiary gaps, however, courts must and do make assumptions for cases to proceed. From *Brown* until *Washington v. Davis*, the Court made the assumption in favor of the plaintiff because, as a historical matter, whites were always afforded a higher value and actions were taken with the direct intent of furthering this bias.[330] Thus, the assumption was justified. The intent doctrine, conversely, shifted the burden to plaintiffs and assumed individuals are treated equally.[331] Consequently, evidentiary gaps consistently lead to findings in favor of the defendant.[332] In short, the issue is not whether an assumption will be made, but in whose favor it will be made.[333] The Court justified the presumption in favor of plaintiffs in the cases following *Brown*, but offered none for shifting it in favor of defendants in *Davis*.

Now the question is whether deliberate indifference's assumption that, absent a denial of equal protection, all citizens are afforded consideration and protection is appropriate. Although it is possible that the government can be indifferent to all its citizens and treat everyone equally by treating everyone poorly, it is unlikely and runs contrary to our republican form of government, which equal protection was enacted to solidify.[334] Equal protection's attempt to create affirmative rights and substantive change would be entirely undermined if it allowed a race to the lowest level of rights where non-protection and inconsideration were its fulfillment. A deliberate indifference standard prevents this.

Deliberate indifference's assumption is also normatively and fundamentally consistent with how the Framers and we expect the government to act toward its citizens.

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[329] NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047–48 (6th Cir. 1977) (subjective intent is impossible to discover short of admissions); Strauss, *supra* note 241, at 953–68 (finding that one can only speculate as to how a different group would have been treated).

[330] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209–10 (1973) (finding history and fairness warrant a presumption of discrimination); Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968) (presuming racial imbalances to be vestiges of discrimination).

[331] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (alleged victim "has the burden of proving . . . 'purposeful discrimination'").

[332] Eisenberg & Johnson, *supra* note 243 (empirical data show a pattern of failing to infer discrimination).

[333] *See, e.g.*, David Crump, *From* Freeman *to* Brown *and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753, 776–92 (1993) (discussing the Court's need to make assumptions in desegregation and whether they were justified).

[334] ELY, *supra* note 123, at 135–79.

Assuming that the government affords all its citizens consideration and value is to do no more than assume that it acts in good faith toward its citizens. A government acting in good faith towards its citizens naturally recognizes their dignity and worth, treats them accordingly, and does not willingly or unnecessarily visit harms upon them.[335] Only when the government is acting for the advantage of one group in relation to another—quintessentially unequal treatment—or for some interest it deems (but may not be) of more importance does it so harm its citizens. In short, deliberate indifference's assumption does not inflate the valuation of minorities above others, but merely requires the government to live up to its obligation to its citizens.

Moreover, deliberate indifference's assumption is merely a legal recognition of this country's racial reality. Whites have always been in the majority, and it is no real assumption that they have and will act in good faith toward themselves, as majorities generally do.[336] For this very reason, rather than specify the numerous rights that blacks needed in the Civil War's aftermath, Congress, in the Civil Rights Act of 1875, ensured these rights with the simple provision that all "shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[337] This was not only an antidiscrimination principle; it was also a creation of substantive rights for blacks.[338] Congress knew that the government and private individuals acted in good faith toward whites and, thus, it needed do no more than tie blacks' rights to those of whites to ensure they were afforded all the rights that were necessary and proper.[339] Similarly, the deliberate indifference standard makes no real assumption, but is grounded in what history has shown and Congress has known regarding how the government will treat whites. Thus, a deliberate indifference standard will not inflate the value of minorities, but merely ensure a minimalistic level of consideration and value below which the government cannot fall.

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[335] *See, e.g.*, THE FEDERALIST NO. 51 (Alexander Hamilton) (describing our system of government as one designed to prevent the bad faith and oppressive tendencies that are inherent in human nature); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528–33 (1992) (discussing a republican form of government as one that "embraces an ongoing deliberative process, inclusive of all cultures, values, needs, and interests, to arrive at the public good").

[336] ELY, *supra* note 123, at 78.

[337] 42 U.S.C. § 1981 (2000).

[338] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968) ("[I]t would do more [than destroy discrimination]: It would affirmatively secure for all men . . . the 'great fundamental rights' . . . ."); *see also id.* at 423–33 (discussing the breadth of the Act).

[339] *Id.* at 430–35 (indicating Congress had intended to use the broadest, surest, and most sweeping language possible, which was achieved by tying the rights to whites).

CONCLUSION

The Supreme Court's decisions over the past thirty years have steadily eroded the law's ability to remedy racial inequality. Inequities that advocates would have vigorously attacked just a few years ago are now becoming accepted realities. The Court's retreat from the promise of its earlier civil rights cases, however, is confusing. The Court's main tool in this retreat, the intent doctrine, has lacked the clarity for courts to apply it effectively. Moreover, in none of its cases has the Court offered any justification for the intent standard or how it appropriately implements equal protection. The problem stems from the Court's failure to address the inherent ambiguities of equal protection. It has, in effect, made up its standards and distinctions as cases arose, often relying on personal biases rather than constitutional history or doctrine.

If equal protection is going to have any future relevance to racial justice, the Court must return to its history. There, a meaning broader than a simple prohibition on discrimination will emerge. That meaning demands that government is accountable to its citizens, affording all of them the consideration, value, and protection that it has afforded the majority.

The intent doctrine is antithetical to this meaning. Where equal protection would provide change, the intent doctrine would lock old ways in place. Where equal protection would demand affirmative consideration of citizens, the intent doctrine would find indifference is sufficient. Moreover, even when the discrimination for which the Court is looking may have occurred, the intent doctrine often renders decisions in favor of defendants due to its dependency on unobtainable evidence.

A deliberate indifference standard overcomes these practical limitations. More importantly, it is consistent with equal protection's meaning, requiring that the government consider the racial harms that it perpetrates and avoid them when possible and when no legitimate reason justifies them. In this respect, it ensures that the government affords its citizens the consideration, value, and protection to which the Fourteenth Amendment entitles them.